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THE NEW YORK CITY FIRE DEPARTMENT UNDER THE NEW YORK CITY COLLECTIVE BARGAINING LAW

By Eric J. Schmertz*

Among the most important developments in the field of labor relations in the last fifteen years has been the extension of unionism and collective bargaining to the public sector. Although union-management relations did exist in government prior to this period, as membership in the public employee unions increased, and the concept of collective bargaining was formally accepted by government entities, it became inexorable that the process would have to be further refined and institutionalized.

This article reviews some aspects of institutionalized labor relations between the City of New York and the Unions representing employees of its Fire Department. It deals specifically with scope of bargaining issues, arbitrations, and the 1973 bargaining impasse under applicable municipal and state labor laws.

I. BACKGROUND

Public sector labor law's earliest stages were characterized by the negative and nonalternative commandment, "Thou shalt not strike." This prohibition was issued in response to the earliest formation of public employee groups, their attempts to formulate

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1. This growth coincided with phenomenal increases in public employment. United States Department of Labor, Bureau of Labor Statistics reports for the period show that while the private sector non-agricultural workforce increased by 26 percent during 1960-71, HANDBOOK OF LABOR STATISTICS 69, 72 (1973), employment in government increased by 50 percent during these years. Id. at 117. Corresponding growth rates at the levels of state and local government were 85 percent and 57 percent respectively. Id. at 117. Membership in public sector employee unions rose from 1.1 million in 1960, MONTHLY LABOR REVIEW (July, 1970), to 4.5 million in 1972, U.S. Dept’ of Labor Newsletter, Pub. No. 73-390 (August 22, 1973), an increase of more than 400 percent.

2. J. Stieber, PUBLIC EMPLOYEE UNIONISM: STRUCTURE, GROWTH, POLICY (Brookings Institution, 1973). In 1959, Wisconsin was the only state with a statute governing public sector labor relations. In little more than a decade, thirty-four states adopted such laws; seven others have addressed the matter of public employee relations in executive orders, attorneys' general opinions and court decisions.

and present demands, as well as the actual conduct of negotiations that were occurring on an isolated, ad hoc and essentially permissive basis.

New York City was probably unique as a municipality in that the period of preparation preliminary to the enactment of legislation mandating full-scale, formal labor relations, collective bargaining and alternatives to the proscribed strike in its public sector was extremely prolonged. This protracted developmental stage had both good and bad effects. By 1967, when the Taylor Law\(^4\) and the New York City Collective Bargaining Law\(^5\) [hereinafter the NYCCBL] were enacted, there were over four hundred collective bargaining units and a host of unions and associations negotiating with the City in a variety of contexts and levels.\(^6\) While this fragmentation imposed considerable difficulty and strain in the negotiation and administration of individual contracts, it also meant that those who fashioned the New York City law had a fifteen or twenty year history to draw upon in determining what would best serve the needs of the already existing labor relations community. The existence of this mature and sophisticated labor relations community aided development of the new law in a number of ways. First, the community's existence served to facilitate a tripartite approach\(^7\) to the drafting of the law governing the relationship between the New York City government and its employees.\(^8\) Second, its long experience led to the rapid adoption and adaptation of traditional private sector labor relations techniques and settlement mechanisms into the new law. Third, it provided from the outset the means to implement the labor relations program mandated by the new law.


6. When the NYCCBL became effective on January 1, 1968, there were 405 certified bargaining units. 1973 New York City Office of Collective Bargaining Annual Report [hereinafter OCB Annual Report].

7. A tripartite panel, consisting of labor, management and impartial representatives, was established in 1965 by Mayor Robert F. Wagner and continued under subsequent administrations. The result of the panel's work was issued on March 31, 1966, in the Statement of Public Members of Tripartite Panel to Improve Municipal Collective Bargaining Procedures which embodied the details of an agreement between representatives of municipal employee organizations and representatives of the City of New York.

8. This community also was capable of demonstrating considerable strength and militancy. Exactly one year prior to the effective date of NYCCBL, on January 1, 1966, the Transit Workers Union greeted the newly inaugurated Lindsay administration with a transit strike which continued for thirteen days with profound effect. See N.Y. Times, Jan. 1, 1966, at 1, col. 8; N.Y. Times, Jan. 13, 1966, at 1, col. 8.
An examination of the experience in New York City's Fire Department since the enactment of the NYCCBL will serve to provide a comprehensive view of the law's procedures, and the way it has been interpreted, and administered. It must be noted at the outset, however, that while the uniformed employees of the Fire Department have most, if not all, of the characteristics of other civil service employees, there are factors peculiar to this group which have given rise to unique problems and issues not generally found among other public employees.

As a uniformed and quasi-military body, the fire fighting force by history and tradition has developed a more clearly defined and rigid hierarchical structure than is generally found in most other areas of city government. In a city the size and density of New York, only the function of the police force is comparable to the essentiality of the fire department's function. Official recognition of the vital roles of these two groups in the affairs of the city is evidenced by a long history of legislation and policy dealing specifically with the organization, employment and remuneration of the two uniformed forces.\(^9\)

One issue of considerable current controversy arising out of the historic recognition of the importance of the fire and police departments' role in the City's life is the eighty-year practice of maintaining a parity of wages between the uniformed employees of the two groups.\(^10\) Decisions of the New York State Public Employment Relations Board and the New York City Board of Collective Bargaining have recently indicated that the concept of parity as a bargaining issue may be incompatible, in whole or in part, with the full and free collective bargaining on matters of wages (as well as of hours and conditions of employment) now mandated by law.\(^11\)

Another factor in the special status of the uniformed Fire Department employees is political power. The ready-made organ-

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9. See, e.g., N.Y. GEN. MUN. LAW § 207-b (McKinney 1974) (additional retirement benefits); id. § 207-f (permitting payment of retirement benefits to firemen who die before retirement); N.Y. UNCONSOL. LAWS § 1015 (McKinney Supp. 1974) (maximum working hours); id. § 1012-a (eight paid holidays).

10. Uniformed Fire Officers Ass'n v. City of New York, Decision No. B-14-72, Docket Nos. BCB-116-72 and 118-72, Decision No. B-14-72 (Aug. 2, 1972). In these citations, the last two numbers in the decision number indicates the year. For a further discussion of the citation form, see note 32 infra.

izational strength offered by the natural homogeneity of this group,\textsuperscript{12} has been fully exploited to create a singularly effective lobbying force. An example of this power is the special legislation enacted in 1974\textsuperscript{13} to exempt all but the very highest levels of uniformed fire officers from those provisions of the Taylor Law and the NYCCBL which bar managerial and confidential employees from collective bargaining.

In reviewing those elements which are unique to a uniformed force as opposed to any other group of public employees engaged in collective bargaining, it is necessary to recognize society's universal preoccupation with preventing interruptions in fire-fighting services. The law in New York State still prohibits strikes by any public employees, regardless of the nature of their work;\textsuperscript{14} no distinction is made between essential and nonessential services. To create a broad general alternative to the strike, the New York City Council amended the NYCCBL in 1972 to provide for the resolution of interest disputes through impasse procedures which include processes for the appeal and review of impasse panel recommendations. These provisions constitute a form of mandatory, final, and binding arbitration of bargaining deadlocks which are applicable to all public employees subject to the law.\textsuperscript{15}

\begin{footnotesize}
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\item N.Y. Civ. Serv. LAW § 201(7)(c) (McKinney Supp. 1974). By adding paragraph (e) the Legislature provided that in "a paid fire department in a city of one million or more inhabitants . . . members in the rank of deputy chief or lower shall not be . . . designated as managerial and/or confidential employees."
\item N.Y. Civ. Serv. LAW § 210 (McKinney 1973).
\item NEW YORK CITY, N.Y. ADMIN. CODE § 1173-7.0c(4) (1972) provides:
\begin{enumerate}
\item Review of impasse panel recommendations:
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\item A party who rejects in whole or in part the recommendations of an impasse panel as provided in subparagraph (e) of paragraph three of this subdivision c may appeal to the board of collective bargaining for review of the recommendations of the impasse panel by filing a notice of appeal with said board within ten days of such rejection. The notice of appeal shall also be served upon the other party within said time. Upon failure to appeal within the time provided herein, the recommendations shall be final and binding upon the party failing to so appeal, except that the board, upon its own initiative, may review recommendations which have been rejected.
\item The notice of appeal shall specify the grounds upon which the appeal is taken, the alleged errors of the panel, and the modifications requested. The board shall afford the parties a reasonable opportunity to argue orally before it or to submit briefs, or may permit both argument and briefs. Review of the recommendations shall be based upon the record and evidence made and produced before the impasse panel and the standards set forth in subparagraph (b) of paragraph three of subdivision c of section 1173-7.0 of this chapter, provided,
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legislation in this area, on the other hand, has apparently recognized a distinction between essential and nonessential services. Whereas the strike ban remains in effect as to all state employees, under the Taylor Law, mandatory, final, and binding arbitration for the resolution of bargaining impasses is provided only for police and fire services.\footnote{16}

The anomaly of a quasi-military department with forward ranks, uniforms and authoritarian discipline that is subject nev-
ertheless to militant unionization and collective bargaining with its consequent restrictions on discretionary authority has required considerably greater adjustment by the fire department than by most other governmental services. The rights granted to firemen to organize and to bargain collectively may have been perceived by the department's management as an unwelcome curtailment of its previously unrestricted authority. The employees and their unions, on the other hand, may have interpreted the enabling legislation as an opportunity to assert newly acquired rights aggressively and uncompromisingly. As a result, relations between management and the unions have been characterized by antipathy, combativeness and distrust. There are signs, however, that the worst of this period of adjustment may be past and that a new maturity, encouraged by experiences under the public sector labor laws, is taking hold.17

The Taylor Law extends to firefighters (and to all other public employees throughout the state) the guarantee of the right to organize and to bargain collectively with their employers.18 Section 212 of the Taylor Law provides that local governmental entities may enact their own laws and create their own procedures for the implementation of this guarantee.19 New York City exercised its option by enacting the NYCCBL and by creating the New York City Office of Collective Bargaining [hereinafter OCB] to administer it.

The tripartite character of the study group appointed by Mayor Robert F. Wagner in 196520 to draft the NYCCBL made possible what amounts to a negotiated public sector labor law for New York City. Because the parties directly affected by the law participated fully in its formulation, they have demonstrated a unique commitment to its successful implementation. Labor from the Municipal Labor Committee and city representatives cooperated in fashioning the only major revision made in the law since its original enactment in 1967,21 and in amending the Consolidated Rules of the Office of Collective Bargaining22 to con-

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17. The recent agreement between the City and the UFA (and other affected unions) to avert employee layoffs by relinquishing certain contract benefits is an example. See N.Y. Times, Feb. 26, 1975, at 20, col. 7.
19. Id. § 212.
20. See note 7 supra.
21. See note 5 supra.
22. The Revised Rules were published in The City Record (July 14, 1972, and Aug. 14, 1972); they are compiled in Revised Consolidated Rules of the Office of Collective Bargaining.
form with changes in the law.

The OCB in its structure and function follows the tripartite pattern found in the legislative history of New York City's public sector labor relations program. The chief executive body of the agency is the seven-member Board of Collective Bargaining which consists of two management members appointed by the Mayor, two labor members appointed by the Mayor upon their designation by public employee unions, and three impartial members who are elected by the management and labor members. The impartial members constitute a second board as well: the Board of Certification. This board deals with matters affecting representation, making *inter alia*, unit determinations, and findings as to the managerial and confidential status of public employees. One of the impartial members serves as chairman of both boards and as director of the OCB.

The Board of Collective Bargaining makes all major policy decisions of the agency. These include interpretations of the NYCCBL, determinations as to the scope of bargaining and the arbitrability of grievances. The Board also provides the final appeal and review step in the process whereby interest disputes are mandatorily and finally resolved.

Certain provisions of the NYCCBL are the result of collective bargaining relations between the City and its employees which existed prior to the enactment of the NYCCBL. One of these is a section of the NYCCBL which creates various levels of bargaining, some of which correspond to the types of negotiating units

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BARGAINING (1972).

24. Id. § 1172.
25. Id. §§ 1170, 1173-5.0b.
26. Id. § 1173-4.3a provides in pertinent part:

Subject to the provisions of subdivision b of this section and subdivision c of section 1173-4.0 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions.

The numbered subparagraphs of this section define the duty to bargain expressed in subsection a by dealing with special circumstances; for example, subparagraph (3) deals with bargaining for matters which must be uniform "for all employees in a particular department." In addition subparagraph (4) excludes from paragraph (a):

all matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, shall be negotiated with the certified employee organizations representing the employees involved.
which predated the statute. In the Fire Department, there are two such units: one unit of rank and file firefighters, represented by Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO [hereinafter the UFA]; and the other, a unit composed of fire officers, represented by Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO [hereinafter the UFOA].

At a very early stage, it became apparent to all concerned that the appointment of an impartial chairman, familiar with the operations of the fire department and sensitive to the special characteristics of the relationship between the parties, would simplify dispute settlement procedures and facilitate the prompt resolution of controversies. The writer was thereupon designated by the parties as impartial chairman and has continued to this date to serve in that capacity. This action was not expected to remove all controversy from the bargaining relationship, nor did it do so: contract administration both before and after the appointment of the impartial chairman has involved grievance arbitrations, and contract negotiations have required mediations and impasse procedures. Indeed, one brief but dangerous strike occurred during the 1973 contract negotiations between the City and the Firefighters, despite the employment of all recognized dispute resolution mechanisms and the pendency of a proceeding in which the City sought injunctive relief to forestall the strike.27

None of this speaks against the efficacy of an impartial chairmanship any more than it demonstrates that collective bargaining laws and dispute settlement techniques are ineffectual or that the courts of the state are powerless. It seems more reasonable to conclude that, without all of the means already employed, rather than occasional disruptions which can be and have been readily contained and adjusted, we likely would have frequent, prolonged strikes with serious implications for the safety and welfare of the public.

During the period from January 1, 1968, to December 31, 1974, the Board of Collective Bargaining processed 220 cases involving questions of scope of bargaining, full faith compliance with the statute28 and the arbitrability of grievances. During the

27. See discussion at notes 87-104 infra and accompanying text.
28. Prior to 1969, the Board of Collective Bargaining had the power, under Section 1173-5.0a(1), to make findings as to whether a party was acting in full faith compliance with the statute; the Board's authority in this area was purely advisory, however, and included no remedial powers. In 1969, the Taylor Law was amended by the addition of Section 5(d) to Section 205, authorizing the establishment of procedures for the prevention
same period there were 376 grievance arbitrations and 112 interest disputes which were dealt with by impasse panels. Since the 1972 amendment of the NYCCBL, the impasse panel reports have been subject to appeal to the Board of Collective Bargaining: there have only been six such appeals, however.

Many of the cases reflected in these statistics involved only routine issues of contract administration and negotiation and made no particularly noteworthy additions to the body of law governing New York City municipal labor relations or the labor-management relationship in the New York City Fire Department. Accordingly, only those cases which have contributed to the development of labor relations activities in the Fire Department will be discussed.

II. SCOPE OF BARGAINING ISSUES

A. Management Rights

In a series of cases decided during its early period, the Board of Collective Bargaining dealt not only with substantive issues of statutory interpretation but also defined its own powers and areas of overall jurisdiction. In 1968, for instance, in *City of New York v. Social Service Employees Union*, the Board held that it had exclusive jurisdiction to make determinations as to scope of bargaining. It then defined the broad general categories, analogous to the decisions of improper practices; PERB was given exclusive non-delegable jurisdiction over such matters except that applicability of PERB jurisdiction in New York City was deferred until March 1, 1970. Each year thereafter, the deferral was extended by the State Legislature until the following March. During this period, improper practice jurisdiction, including remedial powers, was exercised by the Board of Collective Bargaining. The NYCCBL was amended in 1972, to reflect this increase of Board jurisdiction and to make specific provisions for its exercise. See note 4 supra. Due to the inability of the State Legislature to agree to the passage of various proposed amendments to the Taylor Law unrelated to the deferral to OCB jurisdiction, none of the proposed amendments, including a section extending OCB jurisdiction, were passed. Consequently, Board of Collective Bargaining jurisdiction over improper practices lapsed on March 1, 1973.


30. See note 5 supra.


32. Docket No. BCB-22-68, Decision No. B-11-68 (Jan. 8, 1968). Cases before the Board of Collective Bargaining are cited by their docket numbers, each with the letter prefix BCB (e.g., BCB-1-68), or, in review of impasse proceedings BCBI (e.g., BCBI-1-73). Decisions of the Board are cited by decision number, each with the letter prefix B (e.g., B-5-69); arbitration cases are cited by docket number, each with the letter prefix A (e.g., A-12-72), and impasse cases by docket numbers which commence with the letter I (e.g., I-4-68).
to those recognized in private sector decisions of the federal courts and the National Labor Relations Board, of mandatory, permissive and prohibited subjects of bargaining. This decision also held that § 1173-4.3b of the NYCCBL, the so-called Management Rights provision, created an area of management prerogative within which the City might act on a unilateral basis and without an obligation to bargain collectively. Matters falling within the coverage of this provision were held to be permissive subjects bargaining only upon consent of the City.

One of the earliest Board of Collective Bargaining decisions involving firefighters was issued in City of New York v. Uniformed Firefighters Association. In that case, the Board dealt with that portion of the Management Rights provision which states that, where management’s exercise of its prerogative results in a practical impact upon affected employees, there shall be a duty to bargain. The parties had differed in contract negotiations as to the City’s duty to bargain on the question of the size of the work force, the Union asserting that firemen and fire companies were overworked and demanding manpower increases. It was proposed that this issue be submitted to an impasse panel along with the question of whether unilateral decision-making by the City created a practical impact upon unit employees. Of prime significance in this case was the determina-


34. NEW YORK Cty, N.Y. ADMIN. CODE § 1173-4.3b (1979) provides:

   It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.


36. The term "practical impact" was defined, for purposes of that decision, as referring to an "unreasonably excessive or unduly burdensome workload as a regular condition of employment."
tion that only the Board of Collective Bargaining has jurisdiction to decide that a practical impact has been created. Of almost equal importance was the further holding in that decision defining the procedures to be employed in alleviating a practical impact. The Board said in pertinent part: 37

1. Once this Board determines that an "impact" exists, the City will be required expeditiously to take whatever action is necessary to relieve the "impact." Relieving the impact can be done by the City on its own initiative if it chooses to act through the exercise of rights reserved to it in Section 5c. If it cannot relieve the "impact" in that manner, or if it chooses to take action by offering changes in wages, hours and working conditions—means which are not reserved to the City specifically under Section 5c—then, of course, the City cannot act unilaterally but must bargain out these matters with the Union. In that case, failure to agree will permit the Union to use the procedures of the law to the full including the use of an impasse panel.

2. If the Board should determine that an "impact" exists and (1) the City does not, or cannot, act expeditiously to relieve the "impact" as provided in paragraph 1 above, or, (2) if the Union alleges that the City having exercised rights under Section 5c has failed to eliminate the "impact," this Board will order an immediate hearing, under its rules, which shall be given priority in its schedule. If the Board should find that the "impact" still remains, the City shall bargain with the Union immediately over the means to be used and the steps to be taken to relieve the "impact," such bargaining to be limited to a period of time to be determined by the Board in each case, except as the parties may otherwise agree. In such bargaining, it shall not be open to the City to urge that Section 5c precludes the Union from requiring the City to bargain on areas specified in that Section, and all rights there contained and heretofore reserved to the City shall for this purpose come within the scope of collective bargaining. Thereafter, if the parties cannot agree and reach an impasse, an impasse panel shall be appointed which shall have the authority to make recommendations to alleviate the impact including, but not limited to, recommendations for additional manpower or changes in workload.

Briefly, this system consisted of several phases. To begin with, the City was permitted a reasonable time following the Board's finding of practical impact in which to alleviate unilaterally the effect upon unit employees. If effective corrective action

was not taken within a reasonable time, the City was obligated to negotiate with the employee representative concerning alleviation of the impact.

At first glance this procedure undoubtedly seems cumbersome and unwieldy. It was not intended, nor would it be suitable, for general application in all practical impact cases, especially in matters requiring immediate response. In the circumstances of the particular case in which it was employed, however, it was deliberately designed to deal not with an acute crisis but with a chronic Fire Department problem, that is compounded by steadily increasing demands for firefighting services, multiplying difficulties in the delivery of services, and rising personnel costs. The process devised by the Board recognizes that any feasible long-term solution of this problem must necessarily result in union acceptance of, and cooperation in programs for improving productivity such as the introduction of technological improvements to increase efficiency. The process set in motion by the Board in its Decision No. B-9-68 has yet to reach a final conclusion. A mere yes or no answer to the Union’s 1968 demands or a formula suitable to compromise the opposing views of management and labor regarding meaning at that time would, undoubtedly, long since have become obsolete. Instead of such a transitory resolution, the Board’s decision has provided the parties with an apparatus for continuing cooperative effort, negotiation and experimentation with various means of dealing with the changing workload and duties of firemen as the quantity and nature of fires change and as new equipment and technological methods are introduced to meet these conditions.

Following the issuance of Decision No. B-9-68 on November 12, 1968, the writer was appointed by the Board as a hearing officer to conduct the inquiry, prescribed in the decision, as to whether a practical impact existed. After extended hearings and mediation, the parties entered into a Memorandum of Understanding in September 1969, whereby it was agreed, *inter alia*, that:

Public Member Eric J. Schmertz of the Office of Collective Bargaining will establish “workload standards” and provide for review of these and other standards.

A decision pursuant to the Memorandum of Understanding issued in September 23, 1971, held as follows:

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38. Uniform Firefighters’ Officers’ Ass’n v. City of New York, Docket No. BCB-175-
1. I am persuaded that the workload to measure consists of those duties that make up the primary responsibility of firemen and fire officers—namely, responding to alarms and fighting fires. I find that under present fire fighting conditions and techniques, the best method to measure that workload is by a Weighted Response Index. The Index I have developed, based on those conditions and techniques, includes all pertinent fire fighting activities, and accords point credit to those activities. That Weighted Response Index, which is attached hereto and made a part hereof as Exhibit 3, shall constitute the workload standards. The point scores accorded each activity shall be used in measuring the quantity of the workload. From the statements of the Fire Department in the record, I am satisfied that an accurate administration of the Weighted Response Index by the Fire Department is fully feasible.

2. Under the Weighted Response Index, it shall constitute a "practical impact" within the meaning of § 1173-5.0a(2) of the New York City Collective Bargaining Law and Decision B-9-68 of the Board of Collective Bargaining dated November 12, 1968, when, based on the work it performs, a company accumulates 300 or more points in each of a total of 27 weeks within a consecutive 52-week period.

The first consecutive 52-week period shall commence on January 1, 1972.

The device thus created for measuring work-load has been in use to date in the department and has constituted a sufficiently precise gauge to allow studies and determinations of workload at the fire company level. Further developments in the process set in motion by Decision No. B-9-68 will be discussed below. Here, it suffices to show how means were devised for dealing with continuing workload and manning problems of great complexity.

Further clarification of the Management Rights provision of the NYCCBL was provided by the Board in its Decision No. B-7-69,39 in which the UFA claimed that assignment of certain clerical duties to firefighters was in violation of job descriptions contained in the contract. The City maintained that the Management Rights provision of the law justified its actions in that it was the right of the Employer to determine the duties of firefighters.40 The Board found that there was arguable basis for the union

34. See note 34 supra.


40. See note 34 supra.
claim that management had bargained on the matter and that it was covered by the collective bargaining agreement.

Although the particular subject matter of the case had no special importance, it did afford the Board an opportunity to state a significant rule of general application, namely, that although the inclusion of a permissive or voluntary subject of bargaining in a contract did not transform it into a mandatory subject of bargaining,41 "once the City in fact has bargained on such matters and reached agreement which has been embodied in a contract, the provisions of such contract are enforceable."42

B. The Conflict Between Civil Service and Collective Bargaining Laws

A matter of special and unique significance in the public sector is the point at which collective bargaining law and practice come into contact with civil service laws and rules. Not surprisingly, the extent of overlap and potential for conflict between these two areas is considerable. The predictability of the collision derives from the fact that, although the Civil Service Law and the state constitutional amendment which mandated its enactment43

43. N.Y. Const. art. 5, § 6 provides:

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.
were originally conceived as a means of assuring the public that its government would be staffed by persons chosen on the basis of merit and fitness rather than on purely political grounds, in practice the law has had additional far-reaching effects. Among these has been the creation of a large body of employee rights and prerogatives. In fact, for many years the developing body of Civil Service Laws served as the vehicle for protecting and improving the rights of public employees while the rights of private sector employees were advanced through the development of the labor law. With the acquisition of collective bargaining rights in most respects equivalent to those of private sector employees, the government employee has thus acquired two sets of rights which, taken together, may exceed, differ from, or be mutually inconsistent with those rights enjoyed by other employees. The drafters of the NYCCBL attempted to anticipate such anomalies, and in certain instances, succeeded in providing against them. One such instance is evidenced in the statutory requirement for the filing of waivers along with requests for arbitration.44 The purpose of this provision is to prevent public employees from invoking rights derived from collective bargaining and, if unsuccessful, thereafter submitting the same underlying dispute to another forum in pursuit of rights under Civil Service law and rules.

In Decision No. B-8-71,45 an interesting variation on the hypothetical sequence described above, the UFA sought arbitration of the disciplinary dismissal of three firefighters, alleging that the proceedings leading to the dismissal were not conducted in conformity with the contractual provisions guaranteeing the right of union representation in disciplinary proceedings. The distinctive factor in that case was that the dismissed employees had sought relief in the courts not under Civil Service law but under the collective bargaining agreement and by way of proceedings under New York Civil Practice Law and Rules, Article 78, prior to submitting the matter for grievance arbitration. In response to City objections to the arbitrability of the matter in light of NYCCBL,

44. New York City, N.Y. ADMIN. CODE § 1173-8.0d (1972) states: As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator’s award.

Section 1173-8.0d, the Union argued that the relief sought by arbitration was different from that which might have been obtained in the Article 78 proceedings.

The Board’s ruling on the matter in Decision No. B-8-71 is of interest, not as to the particular issue raised by the parties but with regard to the Board’s thorough examination of the meaning and purpose of the waiver provision. Noting the City’s argument that the waiver requirement constituted a condition precedent to the submission of a dispute to arbitration, the Board went on to hold that the waiver provision requires of a grievant an election of remedies. Having elected one remedy, a grievant would thereafter be estopped from seeking relief by other means and therefore the grievance in the instant case was not arbitrable. 47

C. Parity

In two 1972 cases, the Board dealt with different aspects of the issue of parity which have been a source of controversy in a number of other jurisdictions. In New York City, a system of parity relationships among rank and file and officer units in the Police and Fire Departments set up between 1967 and 1969, through a combination of negotiated agreements and impasse recommendations, created a potentially infinite spiral which, in

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46. For text of statute, see note 44 supra.
49. See, e.g., Firefighters Local 1522 v. Connecticut State Bd. of Labor Relations (Hartford County C.P. 1973), aff’d City of New London, Decision No. 1128 (Conn. St. Bd. of Lab. Rel. Apr. 10, 1973) (held that parity clause in firefighters’ contract was unlawful and parties to contract found to have interfered, restrained and coerced the police union in its future negotiations); City of Detroit v. Killingsworth, (Wayne County Cir. Ct. June 6, 1972) (arbitral award of parity upheld by court on the basis of substantial evidence and sufficient definiteness so that the award was not lacking in finality); West Allis Prof. Policemen’s Ass’n v. City of West Allis, WERC Case XX, No. 17300, MP-294, Dec. No. 12706, (May 17, 1974) (complaint by police union that parity clause in firefighters’ contract unfairly saddled police with burden of bargaining for firefighters denied on the ground that the parity clause is not restraint or interference, but it merely reflects the cost considerations an employer normally takes into account in bargaining).
50. While the pay levels of rank and file firefighters and policemen had historically been maintained on a basis of equality, this had not been true of the first promotional levels in the respective department, i.e., Fire Lieutenants and Police Sergeants. The Fire Lieutenants received 30 percent more than their subordinates whereas Police Sergeants received 16 2/3 percent more than rank and file policemen. Otherwise stated, the pay ratio of Lieutenants to firemen was 3.9 to 3.0 and the pay ratio of Sergeants to policemen was 3.5 to 3.0. With the aim of correcting this inequality, an impasse panel in 1967 directed the first of what was projected as a series of raises for Sergeants which would
1971 following litigation that reached the New York Court of Appeals, cost the City a net of 150 million dollars in wage adjustments.\textsuperscript{51}

Subsequently, in Docket No. BCB-116-72, the UFA alleged that the City had agreed on, but refused to reduce to writing, a contract clause establishing and maintaining a 3.0 to 3.9 wage relationship between Firefighters and Fire Officers.\textsuperscript{52} In Docket No. BCB-118-72, the UFA specifically sought to have included in the collective bargaining agreement a clause guaranteeing parity between the wage level of firefighters and patrolmen, claiming that the City had agreed to that arrangement in contract negotiations. The City denied that it had reached agreement on any of these subjects and also denied it had any duty to arbitrate disputes regarding the inclusion of such matters in the UFOA or UFA contracts. Because of the common subject matter, the Board dealt with both cases in a single decision, Decision No. B-14-72. The Board noted that whereas the Unions claimed preliminary

\hspace{0.5cm} eventually put them on a par with Lieutenants. The rank and file policemen thereupon demanded pay increases to restore their traditional 3.0 to 3.5 wage relationship with Sergeants. This latter demand was substantially acceded to by the City in 1968. Since the City had also guaranteed that it would maintain pay parity between policemen and firemen, the conditions for a pay spiral in the uniformed forces were set. This came to fruition when a new impasse panel, in 1969, ordered a second round of raises for Sergeants to complete the process of equalizing their wage level with that of Lieutenants. At that point the Patrolmen's Benevolent Association [PBA] demanded a wage increase to restore the 3.5 to 3.0 ratio. It was obvious that it was impossible to maintain rank and file pay levels in the two departments on a par, make the pay levels of Fire Lieutenants and Police Sergeants equal and at the same time continue the Lieutenant-fireman wage ratio of 3.9 to 3.0 and the Sergeant-policeman wage ratio of 3.5 to 3.0, all of which the City had agreed to do in its various contracts with the several interested unions. To grant the PBA demand would have required a comparable wage increase for firemen, thereby generating an increase to Fire Lieutenants to restore a 3.9 to 3.0 ratio; which in turn would trigger an increase to police Sergeants; and then a new PBA increase, and on and on. In short, the fulfillment of any single obligation created a contractual duty to make a corresponding adjustment in a different bargaining unit, thereby perpetuating an unending upward spiral.

51. The New York Court of Appeals held that summary judgment was improperly granted by the lower courts to the PBA in its suit which alleged the existence of a collective bargaining agreement with the City of New York containing a parity provision. Since the record was not clear, the court remanded on the question of the exact terms of the contract. PBA v. City of New York, 27 N.Y.2d 410, 267 N.E.2d 259, 318 N.Y.S.2d 477 (1971)(4-3).

After a subsequent trial, the City was directed to pay each patrolman employed during the period October 1, 1968 to December 31, 1970, approximately $100 for each month during said period that the patrolman was employed. PBA v. City of New York, 15 N.Y.L.J. No. 34, Feb. 22, 1971, at 18, col. 7. Thereafter the City settled with the other affected unions by "once around" wage increases.

52. See note 50 supra.
agreement on what the Board characterized as "lock-step relationships" between the various employee groups involved, the City maintained that bargaining in this area had dealt only with questions of "comparability" for purposes of determining the amounts of wage increases to be obtained by each of the various groups involved. Further, the City alleged that there were no promises made to any group to guarantee future maintenance of their respective relative positions throughout the term of their contracts.

In light of the conflicting allegations of fact presented by the parties, the fact that in each case the parties were still engaged in contract negotiations, that in each case the contract, when agreed to, would have a term balance of less than a year, and being of the opinion that it was unlikely that changes in wage scales under either contract would occur in so short a period, the Board withheld judgment on the underlying question of the bargaining ability of parity demands. Instead, the Board instructed the parties to attempt to complete their negotiations with the mediatory assistance of the impartial chairman. This was accomplished without further resort to dispute settlement processes, and it was left to the New York State Public Employment Relations Board [hereinafter PERB] in a recent decision to deal more directly with the scope of the bargaining issue.

PERB held in that decision that the City of Albany had no duty to bargain on the union's demand for a lock-step parity relationship between the wages of firefighters and policemen whereby firefighters would automatically receive a wage increase equal to any such increase negotiated with policemen. The pertinent part of the decision reads:

Such a demand concerns terms and conditions of employment outside their own negotiating unit. In effect, the firefighters seek to be silent partners in negotiations between the employer and employees in another negotiating unit. Moreover, an agreement of this type between the City and one employee organization

53. The NYCCBL authorizes the use of "comparability" as one of several criteria to be used in reaching a settlement. New York City, N.Y. Admin. Code § 1173-7.0c(3)(b)(1) provides that an impasse panel "shall consider wherever relevant . . . (1) comparison of 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 . . . ."


54.1. Id. at 3146.
would improperly inhibit negotiations between the City and another employee organization representing employees in a different unit.

The PERB decision in the Albany Firefighters case held that parity bargaining is incompatible with statutory mandates for full and free collective bargaining for public employees.

It may be that parity bargaining as part of a process in which all affected units participate would be not only permissible but desirable as a stabilizing influence in collective bargaining amongst units which have such historically competitive relationships as the Police and Fire units in New York City. It is asserted, however, that parity bargaining with a single unit has the effect of limiting bargaining in the other unit or units covered by the parity ratio agreed upon. It is contended that the inhibition may be effected in various ways. If Fire Officers obtain agreement on a 3.9 to 3.0 relationship with Firefighters, the employer has foreclosed the possibility of bargaining freely on a Firefighter demand for a 3.5 to 3.0 ratio. Moreover, the establishment of any guarantee of maintenance of a fixed ratio will almost surely have a dampening effect upon wage scales in the other unit or units covered by the ratio since the total costs of any wage demand by the latter must be calculated, not only on the basis of the circumstances and conditions in that unit or units, but also in light of increases which will have to be granted to the unit which obtained the parity agreement on a guaranteed ratio.

Those opposed to parity agreements and wage ratios argue that such agreements involve bargaining affecting wages in two or more units rather than a single unit, and that it is basically unsound to allow one bargaining unit to negotiate terms and conditions of employment for another bargaining unit. Since the mutual interests of several bargaining units are involved in bargaining and agreement on any wage ratio, only joint bargaining with equal participation by all affected parties can guarantee that no affected party will be deprived of its bargaining rights.

III. ARBITRATIONS

A. Pre-NYCCBL Historical Effect

As earlier portions of this discussion indicate, the development of the present collective bargaining structure has been a

55. See also cases involving the Connecticut Firefighters, note 49 supra.
gradual process. Events prior to enactment of the NYCCBL continue to influence the course of collective bargaining in various ways even now. One such instance was seen in a 1972 arbitration in which the history of bargaining was the decisive factor in reaching a determination. In that case, the Union complained that the Fire Department’s plan to change the number of annual vacation periods from ten to eight violated Article XII, Section 1 of the collective bargaining agreement. That section incorporated by reference the regulations governing the Annual Leave Allowance Program for the Fire Department, one of which provided that there would be ten vacation periods each year. The Department contended that this rule-and-policy-making power was within the area of management prerogative and that it was, therefore, free to promulgate or amend regulations on a unilateral basis. It maintained, moreover, that it had unilaterally enacted the particular regulation in question many years earlier and had never relinquished its right to amend or rescind such regulations. The arbitrator found that there was “substantial evidence . . . that the ten group structure was . . . ‘negotiated’ by and between the Department prior to January 1, 1959” when the program was instituted and, indeed, that the Union consented to a reduction in vacation entitlement from 216 hours to 210 hours in order to accommodate the new system. The arbitrator also concluded that the group structure was not arrived at unilaterally by the Department but in the course of de facto negotiations between the Department and the Union (which was not then certified as the collective bargaining representative); that it constituted a negotiated condition of employment, the confirmation of which, during two prior contracts as well as the then current agreement, provided sound basis for the Union’s understanding that it was a fixed condition under the contract and not subject to unilateral change by the Department.

B. Payment Procedures

In three 1972 arbitrations, the impartial chairman dealt with grievances of the UFA alleging undue delay by the City in making payment for overtime and out-of-title work by unit employees. In A-200-72, the decision and award recited and adopted a sched-

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57. For another arbitration where pre-NYCCBL history had an evidentiary impact, see text accompanying note 76 infra.
ule proposed by the City for eliminating all current arrearages and projecting a formula for the timing of such payments thereafter. A-251-72 and A-253-72, which dealt with the failure of the City to comply with the schedule set forth in A-200-72, allowed the City two weeks in which to bring its payments into compliance with the schedule with the proviso that interest be paid on any amounts outstanding after the deadline date.

The subject matter involved in these arbitrations has been, in various forms, a source of considerable controversy throughout the City's collective bargaining with its employees. A number of attempts by other unions to obtain improvements in the timing of other kinds of payments to City employees, such as overtime, night differentials, and even negotiated wage increases, have met with only partial success. For example, District Council 37, AFSCME, AFL-CIO has pending a demand in citywide bargaining for a contract provision for payment of interest by the City on monies payable to City employees. The existence of an impar-

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61. New York Crrw, N.Y. ADMIN. Code § 1173-4.3a(2) provides:
Matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved:

The career and salary plan is a general set of rules and regulations relating to pay and benefits which is applicable to most employees of the City of New York, excluding members of the uniformed forces, prevailing rate employees, ferry and marine employees and certain other specified positions. Pursuant to Section 1173-4.3a(2), the Board of Certification designated District Council 37, AFSCME, AFL-CIO, to bargain on behalf of career and salary employees for matters which affect them all equally. The "City-wide contract" thus covers matters relating to method of overtime payment, time and leave rules, premium pay for night shifts, employee access to personnel folders, reduced hours in summer months and many other subjects. Unit representatives certified to represent units composed of employees in related occupations, bargain over matters of particular interest to those employees such as wages, grievance procedure, certain work rules and seniority.
tial chairman, as evidenced by the three 1972 decisions discussed above can provide, through contract construction and interpretation, enforceable working solutions to problems like these which to date have not been resolved on a permanent basis by explicit contractual language.

C. Working Conditions Arbitrations

Not all Fire Department arbitrations are of such moment. Illustrative of this fact is the five-page document of December 4, 1972, in which the impartial chairman rendered awards in, or otherwise disposed of, five arbitrations. In one, the Union's withdrawal without prejudice was noted; in another, the issuance of an award was briefly deferred. In a third (A-249-72), the award points out that a contract provision dealing with earned vacation is self-remedial since it provides that if a fireman cannot take accrued personal leave days prior to the "end of succeeding fiscal year" deadline due to the "needs of the Fire Department," he must "be compensated for the same in cash . . . ." Another of these cases (A-252-72) involved the question whether a contract provision allowing one-half hour for maintenance of personal firefighting equipment applied to "tap-in," i.e., return to quarters after a false alarm as well as after responding to other types of alarms. The award holds that since the contract provisions on "tap-in" make no distinction among various types of alarms, they apply to all alarms including false alarms. If it can be argued that a false alarm will create little need for personal equipment maintenance, it can be argued with equal force that extensive structural fires and building collapses might require unusual activity in maintaining equipment. Blanket application of the one-half hour allowance for "tap-ins" for all forms of alarm is thus justifiable.

The decision in A-260-72 deals with a contract provision requiring "five-man manning" of certain types of equipment on a company basis and a related provision relieving the Department of the five-man requirement when the vacancy in a particular company is due to the absence of the Company's union delegate either on union business or vacation. The grievance arose out of the Department practice of "floating" vacancies, i.e., filling the vacancy caused by absence of a union delegate by transferring a fireman from another company which is then manned by less than five men. The award holds that since the contract language explicitly relieves the Department of the five-man requirement
only where the absent man is the company’s own Union delegate, it cannot be invoked to excuse the undermanning of a company by transfer of one of its men to another company to replace an absent union delegate.

In what the impartial chairman held to be a valid exercise of the powers reserved to management under the management prerogative provisions of the statute, the Fire Department, in 1973, terminated a long standing practice of maintaining a “fire watch,” a special detail of uniformed firemen at Bellevue Hospital whose function was to assure that injured firemen received treatment as expeditiously as possible. The decision held that while there might be merit to the Union’s claim that the change would constitute a safety hazard to firefighters, the issue thus raised related to “practical impact” under the management rights section of the statute and was, therefore, not for an arbitrator to decide but a matter within the jurisdiction of the Board of Collective Bargaining. He distinguished this case from the decision and award in an earlier case, A-63-69, in which he had held that the Fire Department could not terminate a special ambulance service on the ground that, although it was a matter generally within the area of management prerogative and despite the fact that no provision of the then current collective bargaining agreement expressly limited management’s freedom of action in this regard, implementation of the service by the Department had been linked to the purchase by the Union of the ambulance to be used. Thus, the award for the Union in A-63-69 was not based upon any lack of regard for management’s rights under the statute or any finding that the collective bargaining agreement set special limitations on management’s freedom to exercise those rights, but upon the conclusion that the dealings between the Union and the Fire Department, instituted by the latter, as a result of which the Union made a substantial financial outlay in order to induce the implementation of the ambulance service, constituted a special agreement, one of the effects of which was to deprive management of the right unilaterally to terminate that service.

Any careful analysis of grievance and arbitration cases, not only in the Fire Department but in all areas of city government, will demonstrate that a steady increase in the degree of Union sophistication and aggressiveness in the presentation of claims

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has taken place. This is exemplified to some extent by two 1973 arbitrations. In A-304-73, the union claimed that the City violated a contractual guarantee of equal treatment of firemen with regard to special allowances of “excused time” to City employees. The grievance was addressed specifically to excused time granted to City employees on duty between 1:00 P.M. and 5:00 P.M. on December 28, 1972, and January 25, 1973, in observance of the deaths, respectively, of former Presidents Truman and Johnson. Acknowledging that, because of their special work schedules, a much higher percentage of firefighters than of other City employees were off-duty during the hours of excused time, the impartial chairman held, nevertheless, that since the right to excused time during the specified hours (or compensatory time for employees who could not be excused) were conditioned, for all affected employees, upon being on duty, the grant of compensatory time to firemen off-duty during the specified hours was unwarranted. In A-305-73, the Union claimed that a fireman working an overtime tour who was unable to complete the tour because of line of duty injury was, nevertheless, entitled to overtime pay for the full tour. Pointing out that the pertinent contract clause provided for overtime compensation “for the actual period of over-time worked,” the impartial chairman held that the Union’s claim must be denied and that, in view of the above-quoted contract language, the claim would be more appropriately a matter for negotiation than for arbitration.

In a case presented for arbitration late in 1973, the Union grieved the City’s allegedly improper failure to figure the night shift differential payable to a fireman assigned to the Superpumper truck upon the Superpumper differential. The City challenged the procedural arbitrability of the matter as to timeliness on the ground that the night shift differential had been negotiated in 1968, and became effective on January 1, 1969. The Union responded that it had only been a few months prior to the filing of the grievance that the City commenced providing a breakdown of the total amount of firemen’s paychecks showing a separate figure for the amount of night shift differential for a given pay period. Before that time, the Union argued, it was unaware that night shift differential pay for Superpumper firemen was not fig-

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ured on top of their Superpumper differential. The union's contention in this regard was unfuted, and the impartial chairman denied the City's procedural objections. On the merits of the grievance, however, the City showed that at the time of the negotiations for the night shift differential and shortly thereafter, there had been discussions between the parties to the effect that the night shift differential would not be figured on the basis of Superpumper differential. Since the City's case on this point was based upon the testimony of a representative who had participated in those discussions and the Union presented no testimony by a comparably qualified witness, the impartial chairman denied the Union's grievance.

Presently pending before the impartial chairman is an arbitration65 stemming from the practical impact finding in Decision No. B-9-68,66 and the procedure devised for its alleviation.67 The more immediate source for this arbitration was the filing on May 23, 1974, of a petition by the UFA68 seeking a finding by the Board of Collective Bargaining that the City had violated the status quo provision, § 1173-7.0 d of the NYCCBL, in connection with the institution of two Fire Department programs—the Attack Units Program and the Weighted Response Index [hereinafter WRI] Interchange Program—during the period of negotiations then in progress. The status quo provision prohibits unilateral changes by management in wages, hours and working conditions during a period of negotiations as defined in the statute.69

66. See text accompanying notes 35-36 supra.
68. Uniformed Firefighters Ass'n, Docket No. BCB-175-74, Decision No. B-7-74 (June 28, 1974).
69. NEW YORK CITY, N.Y. ADMIN. CODE § 1173-7.0d (1972) specifically provides:
   d. Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending thirty days after it submits its report, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For purpose of this subdivision the term "period of negotiations" shall mean the
On June 26, 1974, the UFOA requested and was granted permission to intervene in the matter. In oral argument before the Board on that day, it made a motion on behalf of itself and the UFA for an order of the Board restraining the City from effectuating its plan to implement the so-called W.R.I.—Interchange Program on July 1, 1974, pending the outcome of the proceeding instituted by the UFA’s May 23, 1974, petition. The motion was denied on the ground that no interested party had shown that it would suffer irreparable harm if the implementation of the program was not enjoined. An attack upon this ruling pursuant to Article 78 of the Civil Practice Law and Rules was found to be moot by Justice Arnold Fein, Supreme Court, New York County in his decision of September 30, 1974. The underlying substantive matter had meanwhile been decided by the Board of Collective Bargaining in its decision No. B-13-74. In that decision, the Board traced the history of the two programs, implementation of which was opposed by the UFA in its petition of May 23, 1974. These programs, the Attack Units Program and the W.R.I.—Interchange Program, were based upon the Weighted Response Index devised by the impartial chairman in his hearings following the Board’s decision, No. B-9-68, on practical impact. Using the W.R.I. to determine which fire companies were subject to a workload constituting a practical impact, the City’s Interchange Program was formulated to enable the exchange of companies in areas of high demand for firefighting services with companies in areas of low demand so as to equalize the workload amongst all fire companies. The Board held that the assignment of fire companies for the promotion of safety and efficiency of operation was a permissive subject of bargaining under the Management Prerogative provision of NYCCBL § 1173-4.3 b. Although its decision in Communications Workers of America, had held that a permissive subject of bargaining, if

period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.
70. UFOA joined only in that portion of the UFA petition addressed to the W.R.I.—Interchange Program since it had already entered into an agreement with the City covering implementation of the Attack Units Program.
71. In re Vizzini, Index No. 10551/74 (Sup. Ct. N.Y. County 1974).
73. See note 35 supra and accompanying text.
74. For text of statute, see note 34 supra.
included in the predecessor contract, could not be withdrawn unilaterally by management during the life of that contract, management’s right to take unilateral action regarding permissive subjects not previously bargained was held to be otherwise unimpaired. Management’s implementation of the W.R.I.-Interchange Program therefore was held not to constitute a violation of status quo.

The Attack Units Program, the second matter raised in the UFA petition, was a management instituted plan76 for a reduction in the number of officers serving in command of engine companies and of ladder companies. The UFA alleged that it would result in firefighters working under less than the “immediate supervision” provided for in their job specification which was incorporated by reference in the then current collective bargaining agreement. They maintained, moreover, that firefighters would necessarily be required to assume duties and responsibilities appropriate to officers, thus constituting out-of-title work. As with the W.R.I.-Interchange Program, the UFA also alleged that the Attack Units Program involved a mandatory subject of bargaining and that its implementation during negotiations constituted a violation of the status quo. The Board found that the UFA contentions raised issues not only of noncompliance with the statutory status quo provision, but of alleged contract violation (out-of-title work and noncompliance with job specification) and that the matter was thus in point with Building Inspectors, Local 211,77 in which the Union’s allegations of a status-quo violation also spelled out violations of contract terms.

The Building Inspectors decision held that the best evidence of the matters to be maintained in status quo under the statutory provision was the expired contract which dealt with the issues in dispute. In a later case, Marine Engineers District No: 1,78 the Board dealt with a similar issue and developed its policy further in a ruling analogous to the doctrine enunciated by the National Labor Relations Board in Collyer Insulated Wire.79 The Marine Engineers decision is addressed to cases in which the underlying issues might be dealt with either as alleged contract breaches

76. It had been agreed to by the Fire Officers and embodied in their collective bargaining agreement.
using grievance and arbitration provisions of the expired contract, or as breaches of the statutory obligation of full faith compliance and preservation of the status quo during negotiations. The decision reads, in pertinent part, as follows: 80

In this and in all such cases . . . this Board has and will exercise primary jurisdiction in determining, on a case by case basis, the means to be employed in dealing with the specific controversies presented. Since each such case arises out of an alleged violation of the law which it is the duty of this Board to administer, the Board has exclusive power and discretion to determine whether a given matter should be dealt with as such or whether it is appropriate in a given case to direct that the matter be referred to an arbitrator . . . .

Following the rationale in the Building Inspectors and Marine Engineers cases, the Board ruled that the Attack Units Program constituted an exercise of management prerogative under NYCCBL, § 1173-4.3 b, unless barred by some provision of its expired contract with the UFA, and that the latter question involved issues appropriate for deferral to the impartial chairman.

D. Single Employer—Arbitration Consistency

A characteristic which permeates the entire range of New York City municipal labor relations and which adds a unique dimension to the problems generally dealt with by neutrals is the fact that in an "industry" employing 220,000 workers 81 in approximately 81 departments and agencies, 82 some 71 unions 83 in more than 169 bargaining units 84 are negotiating with only one employer. "Me-tooism" and leapfrogging are, of course, not unknown in the private sector, but the impact of these factors in public sector bargaining is of significant proportions. The potential secondary and precedential effects of his decision must always be present in the mind of the arbitrator or factfinder operating in the public sector.

Upon superficial examination, the demand of a union in a grievance or interest dispute may appear to be of no great mo-

81. OCB ANNUAL REPORT (1973).
82. Id. at 23-24.
83. Id. at 22.
ment. But when measured against the ripple effect it will have in other departments or bargaining units it may be seen to take on quite different proportions.

Two 1970 arbitrations are illustrative. In the first, the union grieved the assignment of firemen to clean firehouse boilers. Based upon proof of an oral agreement entered into several years before and prior to institution of the practice of executing written collective bargaining agreements, the impartial arbitrator found that the cleaning of firehouse boilers was not the duty of New York City firemen. Clearly, the potential secondary significance of this grievance warranted consideration since Police precincts and Sanitation garages also have heating plants. Similarly, in a second grievance, the Union demand for payment to firemen for time spent as respondents during off duty time at departmental trials, had a potential secondary effect upon policemen whose contract contained provisions similar to those relied upon by the UFA. It was conceded that firemen were paid at straight time rates for time spent at departmental trials during working hours. The impartial chairman found in the case before him that the scheduling of a grievant’s trial during his off-duty time, while inconvenient for the particular fireman, was arranged as much for the convenience of his representatives as for the convenience of the department. Although he was entitled to be paid, it was found that he should not be paid at overtime or premium rates which were warranted under the contract only for assignments to duty at the direction of the department and to serve the convenience or need of the department. The award, therefore, directed payment of compensation at straight time rates.

It is not suggested that anything can be done to eliminate the chain reaction or ripple effect in municipal labor relations. Its impact should be recognized and appraised, however. Awareness of the problem on the part of public sector neutrals will doubtless be of considerable value. Experience as an impartial chairman leads this writer to believe that the appointment of other impartial chairmen in departments and areas of City government in which pressures and conflicts indicate the need, would be constructive. The impartial chairman is aided by his unique knowledge of and familiarity with both the particular problems and

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85. Uniformed Firefighters Ass’n, undocketed arbitration (award issued Apr. 10, 1970).

86. Uniformed Firefighters Ass’n, undocketed arbitration (award issued June, 1970).
needs of the parties he regularly serves, and the interrelationships of that group with others elsewhere in the governmental structure. He is thus enabled not only to bring greater consistency to the body of decisions rendered in the department in which he serves, but also to conform them to the broader perspective provided by an awareness of developments in related areas of City government.

IV. THE 1973 IMPASSE

One of the most serious challenges to the NYCCBL and the dispute settlement processes it provides occurred in connection with the negotiations in 1973 between the UFA and the City for a contract for the period commencing July 1, 1973. Negotiations had begun in May, 1973. During the early stages of bargaining neither party treated the matter with particular urgency. Following election of a new slate of Union officers, however, the UFA began in September of 1973 to press for completion of its negotiations. Recognizing the seriousness of the situation, the impartial chairman in October, 1973, intervened in the negotiations and thereafter made his mediatory services available to the parties on a continuing basis. Based on the periodic reports of the impartial chairman, the Board of Collective Bargaining authorized its chairman to declare the existence of an impasse when he deemed it necessary and appropriate. On October 29, 1973, the impartial chairman was formally designated as the Board-appointed mediator with authority to serve as an impasse panel when he or the Board of Collective Bargaining chairman deemed it necessary. On November 2, 1973, the UFA objected to the procedures being followed by the Board and demanded that the formal procedures for establishment of the existence of an impasse and for the designation of an impasse panel be adhered to.87

87. New York City, N.Y. Admin. Code § 1173-7.0c(2) provides:
If the board of collective bargaining, upon recommendation of the director, determines that collective bargaining negotiations (with or without mediation) between a public employer and a certified or designated employee organization have been exhausted, and that the conditions are appropriate for the creation of an impasse panel, it shall promptly instruct the director to appoint such a panel. The director may also appoint an impasse panel upon request of both parties. In appointing a panel, the director shall submit to the parties a single list of seven persons from the register of impasse panel members, and each party shall inform him of its preferences. To the extent the preferences disclose agreement, the person or persons agreed upon shall be appointed to the impasse panel; to the extent the preferences are not in agreement, the director shall
While continuing to urge the parties to waive formalities and technical niceties in the interest of utilizing dispute resolution mechanisms as promptly and effectively as possible, the Board

proceed to designate the members of such panel from the register. Each party may at its own expense designate a consultant to an impasse panel, who shall be available to the panel for assistance.

NEW YORK CITY, N.Y. CONSOL. RULES OF THE OFFICE OF COLLABORATIVE BARGAINING §§ 5.5 to 5.8 (1972), as amended. (Supp. 1974) provides:

§5.5 If the Director concludes that collective bargaining negotiations have been exhausted and that conditions are appropriate for the creation of an impasse panel he shall convey such conclusion either orally or in writing to the Board, with such information as to the nature of the dispute as the Board may require. The parties shall be notified, either orally or in writing, of the Director's recommendation. If the initial request was not a joint request, the party or parties not requesting the creation of an impasse panel shall have an opportunity to object to the recommendation, in writing, within three (3) days after service of notice of the recommendation.

§5.6 Authorization of Panel. If the Board determines that collective bargaining negotiations (with or without mediation) have been exhausted and that conditions are appropriate for the creation of an impasse panel, it shall instruct the Director to appoint such panel. In reaching its determination, the Board may conduct or direct such additional investigation, conferences or hearings as it deems advisable and proper. The Director may appoint an impasse panel, without prior consultation with the Board, upon request of both parties.

§5.7 Size of Panel. An impasse panel shall consist of such number of persons listed on the Board's impasse panel register as the parties may have agreed upon. In the absence of agreement, the Director shall fix the size of the panel.

§5.8 Selection of Panel. If the parties have not agreed on the persons to serve on the panel, the Director shall submit to each of the parties an identical list of seven (7) names chosen by him from the impasse panel register. Each party shall have five (5) days within which to number at least five (5) of the names in order of preference, and return the list to the Director. Failure to return the list within the specified time shall be deemed approval of all persons named therein. The Director shall appoint the panel from those persons who have been approved by both parties, with due consideration for the designated orders of preference. If one or more of those approved decline or are unable to serve, the Director, to the extent necessary, shall appoint the panel members without the submission of additional lists.

88. Recognizing a gap in its powers to deal with emergencies such as that presented by the unforeseeable escalation in the first week of November, 1973, of the dispute between UFA and the City, the OCB revised its Consolidated Rules in 1974, to add a new Rule 5.13 providing the Board with emergency impasse powers. It reads as follows:

§5.13 Time-Board Action. Except as prescribed by statute, the Director or a Deputy Director acting in his absence, for good cause shown, may shorten any time limit prescribed or allowed in these rules. Where such good cause exists, the Director or Acting Director, acting with the approval of the Board of Collective Bargaining, may shorten time limits and invoke expedited procedures in bringing the dispute to impasse proceedings. Approval of such action by the Board shall require the concurrence of at least one labor member and one city member. In the exercise of such extraordinary powers the Director or Acting Director shall be authorized to prescribe such times and conditions for the
acceded to the Union request, formally concluded that an impasse had been reached, and sent lists of names of persons to be designated as an impasse panel to the parties pursuant to § 1173-7.0c of the NYCCBL.

At a UFA general membership meeting in late October, 1973, the Union’s executive board was authorized to conduct a mailed secret ballot strike vote of the membership. Although subsequent events disclosed that the vote had been against a strike, the result announced by the Union’s president on October 30, 1973, was that the firemen had voted “overwhelmingly in favor of a total strike.”

The City, meanwhile, anticipating action on the announced affirmative strike vote, had already commenced a proceeding in Supreme Court, New York County, seeking an injunction pursuant to Section 211 of the Taylor Law to prevent a strike. Hearings were held before Justice Sidney A. Fine in the course of which the court attempted to obtain adherence by both parties to the impasse procedures prescribed in § 1173-7.0c of the NYCCBL. While this proceeding was in progress, on November

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service of notices, filing of pleadings and appearances of parties as the circumstances require and as considerations of due process permit.

89. For text of statute, see note 93 infra.
90. See note 94 infra and accompanying text.
92. N.Y. CIV. SERV. LAW § 211 (McKinney 1973) reads as follows:
   Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section, and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation. If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law.
93. New York Cty, N.Y. ADMIN. CODE § 1173-7.0c (1972) reads:

   c. Impasse panels.

   (1) The office of collective bargaining shall maintain a register of impasse panel members who have been approved for listing thereon by a majority of the entire board of collective bargaining, including at least one city member and one labor member.

   (2) If the board of collective bargaining, upon recommendation of the director, determines that collective bargaining negotiations (with or without mediation) between a public employer and a certified or designated employee organi-
zation have been exhausted, and that the conditions are appropriate for the
creation of an impasse panel, it shall promptly instruct the director to appoint
such a panel. The director may also appoint an impasse panel upon request of
both parties. In appointing a panel, the director shall submit to the parties a
single list of seven persons from the register of impasse panel members, and each
party shall inform him of its preferences. To the extent the preferences disclose
agreement, the person or persons agreed upon shall be appointed to the impasse
panel; to the extent the preferences are not in agreement, the director shall
proceed to designate the members of such panel from the register. Each party
may at its own expense designate a consultant to an impasse panel, who shall
be available to the panel for assistance.

(3) (a) An impasse panel shall have power to mediate, hold hearings, com-
pel the attendance of witnesses and the production of documents, review data,
and take whatever action it considers necessary to resolve the impasse. If an
impasse panel is unable to resolve an impasse within a reasonable period of
time, as determined by the director, it shall, within such period of time as the
director prescribes, render a written report containing findings of fact, conclu-
sions, and recommendations for terms of settlement.

(b) An impasse panel appointed pursuant to paragraph two of this subdivi-
dion c shall consider wherever relevant the following standards in making its
recommendations for terms of settlement:

(1) comparison of the wages, hours, fringe benefits, conditions and charac-
teristics of employment of the public employees involved in the impasse pro-
ceeding 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;

(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 re-
ceived;

(3) changes in the average consumer prices for goods and services, com-
monly 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.

9c: The report of an impasse panel shall be confined to matters within the
scope of collective bargaining. Unless the mayor agrees otherwise, an impasse
panel shall make no report concerning the basic salary and increment structure
and pay plan rules of the city’s career and salary plan. If an impasse panel
makes a recommendation on a matter which requires implementation by a
body, agency or official which is not a party to the negotiations: (i) it shall
address such recommendation solely to such other body, agency or official; (ii)
it shall not recommend or direct that the municipal agency or other public
employer which is party to the negotiations shall support such recommendation;
and (iii) it may recommend whether a collective bargaining agreement should
be concluded prior to such implementation. Any alternative recommendations
proposed by an impasse panel in the event such implementation does not occur
shall not exceed the total cost of the original recommendations.

(d) The report of an impasse panel shall be submitted to the parties to the
negotiations, to any other body, agency or official whose action is required to
implement the panel’s recommendations, and to the director. The director shall,
with the advice and guidance of the board of collective bargaining, determine the
time at which such report shall be released to the public, which shall not be
later than seven days after its submission or, upon agreement of the parties
and approval of the director, not later than 30 days after its submission, pro-
vided that if the parties conclude a collective bargaining agreement prior to the
date on which the report is to be released, the report shall not be released except
upon consent of the parties.

(e) Acceptance or rejection. Within ten days after submission of the panel's
report and recommendations, or such additional time not exceeding thirty days
as the director may permit, each party shall notify the other party and the
director, in writing, of its acceptance or rejection of the panel's recommenda-
tions. Failure to so notify shall be deemed acceptance of the recommendations.
The director may release the acceptances or rejections to the public at such time
as he, in his discretion, may deem advisable. Any provision on such accepted
recommendation the implementation of which requires the enactment of a law
shall not become binding until the appropriate legislative body enacts such law.

(4) Review of impasse panel recommendations:

(a) A party who rejects in whole or in part the recommendations of an
impasse panel as provided in subparagraph (e) of paragraph three of this subdi-
vision c may appeal to the board of collective bargaining for review of the
recommendations of the impasse panel by filing a notice of appeal with said
board within ten days of such rejection. The notice of appeal shall also be served
upon the other party within said time. Upon failure to appeal within the time
provided herein, the recommendations shall be final and binding upon the party
failing to so appeal, except that the board, upon its own initiative, may review
recommendations which have been rejected.

(b) The notice of appeal shall specify the grounds upon which the appeal
is taken, the alleged errors of the panel, and the modifications requested. The
board shall afford the parties a reasonable opportunity to argue orally before it
or to submit briefs, or may permit both argument and briefs. Review of the
recommendations shall be based upon the record and evidence made and pro-
duced before the impasse panel and the standards set forth in subparagraph (b)
of paragraph three of subdivision c of section 1173-7.0 of this chapter provided,
however, that when an appeal is taken to the board on any of the grounds of
prejudice set forth in subparagraphs (i), (ii) or (iii) of paragraph one of subdivi-
sion b of section seventy-five hundred eleven of the civil practice law and rules,
review shall also be based upon the record made in any hearing which the board
may direct on such issues, provided, however, that the board orders such hearing
within thirty days of the filing of the notice of appeal.

(c) Upon such review, the board may affirm or modify the panel recommend-
dations in whole or in part. A modification of the recommendations shall be by
the vote of a majority of the board. The board may also set aside the recommenda-
tions of an impasse panel in whole or in part if it finds that the rights of a
party have been prejudiced on any of the grounds set forth in subparagraphs (i),
(ii) or (iii) of paragraph one of subdivision b of section seventy-five hundred
eleven of the civil practice law and rules. An order setting aside a recommenda-
tion on such grounds shall be based on a written decision and shall be made
upon a vote of a majority of the board. A member of the board who has acted
as a member of an impasse panel shall not be disqualified from subsequently
participating in a decision or determination of the board in the same dispute.

(d) The recommendations of the impasse panel shall be deemed to have
been adopted by the board if the board fails to issue a final determination within
thirty days of the filing of the notice of appeal, or within forty days of a notice-
tication of rejection to the director of the board where the board, upon its own
6, 1974, the UFA executive board ordered a strike. A five and one-half hour work stoppage, the first in the history of the New York City Fire Department, ensued. In the course of that morning's session before Justice Fine, however, the parties entered into the following stipulation:

The parties to this action have agreed on the following procedures which are to be deemed as an order of this Court:

1. The Uniformed Firefighters Association will immediately return to work.
2. There are to be no threats of job action.
3. An impasse panel, consisting of three impartial members, has been agreed upon as follows:
   Eric Schmertz, Chairman;
   Members: Thomas G. S. Christenson and Michael Sovern.
   This panel is to commence its deliberation Wednesday, November 7th, at 12:00 noon, at a place to be designated by the Chairman of the panel. The panel is to render its decision no later than 6 P.M., Saturday, November 10, 1973.
   The City will be given the opportunity to have two days for the presentation of its case, with the union to have the same amount of time if it so desires.
   This stipulation will be so ordered by the Court.

As matters developed, presentation of their respective cases by the parties was not completed until 10:00 P.M. on November 10, 1973, four hours after the time originally set by Justice Fine

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initiative, reviews the panel's recommendations, provided, however, that when a hearing is ordered pursuant to subparagraph (b) of this paragraph four relating to allegations of prejudice, the impasse panel's recommendations shall be deemed to have been adopted by the board only if the board fails to issue a determination thereon within thirty days after the close of such hearing, and provided further, that the director may extend the thirty day or forty day periods mentioned in this subparagraph for an additional period not to exceed thirty days.

(e) Notwithstanding the provisions of this paragraph four, and except for purposes of judicial review, any provision of a determination of the board of collective bargaining the implementation of which requires the enactment of a law shall not become binding until the appropriate legislative body enacts such law.

(f) A final determination of the board pursuant either to subparagraphs (c) or (d) of this paragraph four shall be binding upon the parties. Such a final determination shall constitute an award within the meaning of article seventy-five of the civil practice law and rules.

in the stipulated court order. A brief extension was obtained, however, and after working into the night, the panel issued its Report and Recommendations at 4:00 A.M. on November 11, 1973.

Taking note of the approaching change of administration, the panel expressed the view that the freedom of the new administration to negotiate agreements consistent with its overall policies and programs should be as fully preserved as possible. Accordingly, the panel set the contract term at one year, ending June 30, 1974. It confined itself, essentially, to wage and productivity measures, indicating that it had kept the former within the then applicable national economic stabilization program's 5.5 percent guidelines. The panel's productivity recommendations permitted various reductions in manning that were estimated conservatively to save the City $6,909,500.

An interesting issue raised during the course of hearings before the panel, but not reflected in the Report and Recommendations, was the contention by the UFA that one of the City's demands related to a permissive subject of bargaining and therefore could only be submitted to the impasse panel upon the consent of both parties. The panel held that the permissive nature of the subject was derived from the Management Rights provision contained in NYCCBL Section 1173-4.3b, and that since the statutory provision was intended to reserve management prerogatives, its protection could be invoked only by management. Therefore the City could waive that protection and unilaterally submit it to the impasse panel for determination.

Both parties rejected the Report and Recommendations, the City on November 16th and the UFA on November 19th, 1973. Without awaiting the filing of formal appeals, the Board moved to review the Report and Recommendations pursuant to that portion of NYCCBL § 1173-7.0c (4) (a) which permits the Board to take such action "upon its own initiative."

The Board's review decision No. B-7-73, cited the standards

95. Former Mayor John V. Lindsay was succeeded by Mayor Abraham D. Beame on January 1, 1974.
96. The demand involved reductions in manning as "productivity." Manning is generally treated as a management prerogative, subject to the Management Rights provisions of NYCCBL, Section 1173-4.3b.
97. Uniformed Firefighters Ass'n, Docket No. BCBI-3-73, Decision No. B-7-73 at 2 (Nov. 21, 1973).
set forth in NYCCBL § 1173-7.0c (3) (b), and found that the impasse panel had adhered to and applied them.

That decision also quoted at length from an earlier decision which delineated the nature and scope of the Board's review upon appeal of an impasse panel's report and recommendations. It reads in pertinent part as follows:

If the impasse panel has afforded the parties full and fair opportunity to submit testimony and evidence relevant to the matter in controversy; unless it can be shown that the Report and Recommendations were not based upon objective and impartial consideration of the entire record; and unless clear evidence is presented on appeal either by fraud or bias 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, the Report and Recommendations must be upheld.

Applying that standard, the Board upheld the Report and Recommendations of the impasse panel while recognizing that its wage provisions were still subject to review and approval by the Cost of Living Council under the then applicable Federal Economic Stabilization Program. The impasse panel recommendations thereupon became final and binding upon the parties pursuant to NYCCBL § 1173-7.0c (4) (f), and the Cost of Living Council thereafter found the panel's wage recommendations to be within federal guidelines.

The matter was not yet finished, however. The UFA strike and the circumstances surrounding it were the subject of an investigation by the New York County District Attorney's office in the course of which the impartial chairman (who had served as the mediator) and the Chairman of the Office of Collective Bargaining were asked to give information. While seeking to cooperate in every permissible way with the District Attorney's investigation both men believed that generally accepted professional standards for mediators and other labor relations neutrals, as well as the specific provisions of the Taylor Law, precluded their

98. For text of statute, see note 93 supra.
100. See note 93 supra.
101. N.Y. Civ. Serv. Law § 205.4(b) (McKinney 1973) provides:
(b) No member of the board or its appointees pursuant to this subdivision, including without limitation any mediator or fact-finder employed or retained
testifying as to various matters, their knowledge of which was confidential and privileged. The District Attorney was in accord with these views and they were not required to testify. For this explicit reason the details of what took place in the intensive mediation sessions prior to the strike and impasse procedures are not disclosed here. The investigation, nevertheless, led to an indictment and a plea-bargained guilty plea to a misdemeanor by the UFA's president and two members of its executive board.\(^{102}\)

A further repercussion of the firemen's strike occurred when the UFA requested arbitration of its grievance that Department Order No. 225, transferring a total of one hundred forty-eight firefighters (including a number of union stewards), was in retaliation for the strike, was motivated by antiunion animus and was punitive in nature, in violation of departmental policy and, therefore, in violation of the collective bargaining agreement. In the arbitration which followed,\(^{103}\) the stipulated issue submitted by the parties read in pertinent part:

[Under Department Order 225 the City has violated or inequitably applied the existing policy of the Fire Department not to transfer members of the Fire Department for punitive reasons or for arbitrary and capricious reasons.]

The phrase "has violated or inequitably applied the existing

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policy of the Fire Department not to transfer members of the Fire Department for punitive reasons...” relates to the language of the contract between the parties which defines the term “grievance” as, inter alia, “a violation or inequitable application of existing policy.” The cited phrase of the submission acknowledged that an existing policy of the Fire Department barred transfers for punitive reasons.

The testimony before the impartial chairman established that although the greater part of the transfers were justified both by the management prerogative provision of the NYCCBL104 and by explicit reservations in the collective bargaining agreement of management’s right to make transfers for the “legitimate needs and good of the department,” thirty-five transfers, by the admissions of Fire Department witnesses, were effected because of the undesirable “attitudes” of the transferees.

The impartial chairman found that the Order had also caused “the unilateral, precipitous transfer of some Union delegates...” The award stated, in this connection, that:

Union delegates are recognized representational agents of the Union... under the collective bargaining agreement. For the department to... transfer a delegate without reasonable prior notice to the Union, effectively terminates the Union’s right of representation at the delegate level... I deem that improper whether the inclusion of delegates in Order 225 was inadvertant, unknowing or willful.

Bound both by the terms of the contract and by the form of the stipulated submission of the parties, the impartial chairman, nevertheless, commented at some length upon the appropriate response of management to illegal strikes. He expressed the view that the Fire Department should have a policy and right in that circumstance to transfer firemen guilty of misconduct, to restore discipline, to break up cliques and otherwise act to discourage future job actions, strikes and other such breaches of duty and violations of law. He also stated his opinion that since the strike was illegal and therefore not a “protected union activity,” the department’s retaliation would not constitute an improper practice under the NYCCBL or the Taylor Law. The decision, furthermore, reserved to management the right to initiate disciplinary proceedings against any fireman accused of misconduct in

104. New York City, N.Y. Admin. Code § 1173-4.3b. For text, see note 34 supra.
connection with the strike, regardless of whether his transfer was inconsistent with the department’s transfer policy.

Within the limitations imposed by the contract and the stipulated submission, in light of the Fire Department admissions as to the transfers because of unsatisfactory attitudes, and taking into account the transfers of Union delegates without reasonable prior notice, the award held that thirty-five of the one hundred forty-eight transfers were contrary to existing policy and, therefore, in violation of the contract, and were to be rescinded.

Shortly after publication of the award on August 25, 1974, a N.Y. Times editorial of September 11, 1974, entitled “Oil on the Fire,” characterized the decision as an unwarranted and “dismaying” victory for the strikers “based on a rigid, legalistic interpretation.” Commenting on the Times editorial, in the January, 1975 issue of Study Time, the quarterly newsletter of the American Arbitration Association, editor Morris Stone wrote that against the background of the Times editorial:

We awaited a copy of the full award . . . . On reading it, we were dismayed only by the quality of labor news reporting even in the nation’s most prestigious newspaper. For on the very first page of the opinion we read the issue, as stipulated by both parties: whether the City of New York “has violated or inequitably applied the existing policy of the Fire Department not to transfer members of the Fire Department for punitive reasons . . . .” In short, the City agreed that if a transfer was put into effect for disciplinary reasons, it was a breach of contract . . . in 35 cases, the Fire Department admitted, the purpose [of the transfers] was to scatter men whose “attitude” was objectionable. Was it unreasonable for an arbitrator to conclude that these were disciplinary actions, proscribed by the terms of the union contract and the issue submitted to arbitration?

Controversy continues to spring from the November 6, 1973 strike and its aftermath. Other transfer orders have been, on various grounds, the subject of arbitrations, of disputes before the Board of Collective Bargaining as to arbitrability, and of one improper practice charge, subsequently withdrawn, before the Public Employment Relations Board. Further comment on these matters is precluded by the fact that these issues are still before the Board of Collective Bargaining and the impartial chairman.

CONCLUSION

Labor relations and collective bargaining between the City of
New York and the two fire unions have been marked by litigiousness, hostility and turbulence. In one instance at least, the bargaining between the Department and the UFA, deteriorating as it did into the first strike in the history of the Department and the Union, was manifestly imimical to the public welfare. Yet, it is less probable that we will soon again see utilization of the strike by the UFA, or any other municipal union which renders vital services. This is not simply because the UFA (and others indirectly) are now judicially enjoined from doing so on penalty of imposition of presently suspended criminal sentences, or that the amended law mandates the binding applicability of arbitration, but also because the adjudicatory and dispute settlement procedures of the NYCCBL have been working, albeit slowly but inexorably, to achieve fair, equitable and acceptable resolutions of both grievance and interest disputes. It appears that the UFA, other unions and the City realize that the impasse procedures and the techniques of mediation and arbitration have and will continue to produce essential justice to their legitimate demands and rights consistent with the public interest.105

The neutrals serving in the sensitive capacities of mediator, arbitrator and impasse panelist are discharging those duties with the highest degree of professionalism and competence, mindful of the responsibilities they carry. The availability of these orderly forums, improving as cases increase and experience is gained, will make the strike not just illegal, but unnecessary. The grievance arbitration system, especially the work of impartial chairmen, has established consistency, regularity, and predictability of decisions, enabling the parties to settle matters themselves based on past decisions, and to better screen out unmeritorious or otherwise untenable grievances from submission to arbitration.

So long as the NYCCBL is administered, as now, by an independent agency, staffed by experienced and knowledgeable members and personnel, with competent and professional input from the City’s Office of Labor Relations and representatives of the municipal unions (individually or through the Municipal Labor Committee), continued and sound progress will be made

105. An example is the decision of the Patrolmen’s Benevolent Association, in January, 1975, following an impasse with the City in its contract negotiations, to submit the unresolved issues forthwith to an impasse panel. Included is the PBA’s critical demand for a salary scale above that of firemen and an increase in the ratio over sanitationmen.
toward orderly resolution of public sector labor disputes. That result can be achieved, not just because the law requires that end, but because procedurally and substantively, the law is providing a workable and acceptable alternative to the strike.