

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**ALBANY POLICE OFFICERS UNION, LOCAL 2841  
OF THE NEW YORK STATE LAW ENFORCEMENT  
OFFICERS UNION, DISTRICT COUNCIL 82,  
AFSCME, AFL-CIO,**

Charging Party,

**CASE NO. U-27073**

- and -

**CITY OF ALBANY,**

Respondent.

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**ENNIO J. CORSI, GENERAL COUNSEL (MATTHEW P. RYAN of counsel),  
for Charging Party**

**ROEMER WALLENS & MINEAUX, LLP (ELAYNE G. GOLD of counsel),  
for Respondent**

**DECISION OF ADMINISTRATIVE LAW JUDGE**

On September 15, 2006, the Albany Police Officers Union, Local 2841 of the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (Council 82) filed an improper practice charge alleging that the City of Albany (City) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by submitting nonmandatory subjects of bargaining to compulsory interest arbitration. The City filed an answer denying the allegations. The parties agreed to submit the dispute for decision on a stipulated record in lieu of a hearing. Both parties filed briefs.<sup>1</sup>

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<sup>1</sup>On November 7, 2007 I was substituted for the Administrative Law Judge (ALJ) previously assigned, by the Director pursuant to §212.4(a) of the Rules of Procedure of the Public Employment Relations Board.

### FACTS

The stipulated record consists of Council 82's improper practice charge objecting to the submission of City proposals seeking to modify Article 8, §§8.1.1 and 8.2.1; Article 10, §§10.1.1 and 10.3.3; Article 11; Article 13, §13.3.1; Article 14, §§14.4.1 and 14.2.1; Article 17; Article 19; Article 22, §§22.8 and 22.9; Appendix A; and Appendix B of the parties' collectively negotiated agreement (agreement); the City's answer to the improper practice charge; the parties' agreement covering the term January 1, 2002 through December 31, 2005; the City's response to Council 82's petition for compulsory interest arbitration; the City's contract proposals; the December 8, 2006 letter from Elayne Gold, Esq. to Matthew Ryan, Esq., indicating that the City withdrew from interest arbitration proposals seeking to modify Article 8, §8.2.1; Article 14, §14.4.1; Article 17; Article 22, §§22.8 and 22.9; modifications with respect to Appendix B; and confirming that Council 82 withdrew its objection to Article 8, §8.1.1; and a letter to the parties from ALJ Scott Marchant dated May 1, 2007.

The City's proposals modifying Article 19; Article 10, §§10.1.1 and 10.3.3; Article 11; and Article 14, §14.2.1 remain the subjects of this charge. They are set forth below and discussed individually.<sup>2</sup>

#### Article 19 – Hospitalization and Medical Benefits

##### Proposal to follow

Council 82 argues that the City's proposal is nonmandatory and therefore not properly before the interest arbitration panel as it is vague, ambiguous and lacks precise and definite language. The City asserts in its brief that throughout negotiations and into

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<sup>2</sup>As neither party argued the negotiability of Appendix A in their briefs, that issue is not before me. In addition, Council 82, in its brief, withdrew its objections to Article 13, §13.3.1.

mediation, Council 82 was well aware that its proposal was to increase the current co-pay from \$2.00 to \$7.00.

In its September 5, 2006 response<sup>3</sup> to Council 82's petition for compulsory interest arbitration, the attorney for the City asserted that during negotiations Council 82 was advised that the City intended to eliminate the health insurance plans outlined in Article 19, §19.1.2 and replace them with the "state"<sup>4</sup> plan. As this assertion is sharply at odds with what Council 82 believes is before the panel on the issue of health insurance, i.e. proposal to follow, and what the City believes is before the panel, i.e. increase in prescription co-pay, a conference call was convened for purposes of clarifying the record. In the course of the conference call, the parties indicated that two memoranda of agreements (MOAs) had been executed by the parties and that they included an increase in prescription co-pay among other items. Thereafter, the parties were instructed to provide copies of the MOAs and the dates on which mediation was conducted. In addition, the parties were invited to and did submit supplemental briefs.

In response to my request for additional documents and information as set forth above, it appears that it is undisputed that mediation took place on July 10 and 14, 2006. On July 19, 2006, the parties executed a MOA in settlement of the agreement. The MOA, provided in part, that "the parties agree to increase the prescription co-pay to \$7.00 for each prescription effective 1/1/07." The MOA was rejected by Council 82's membership. On May 11, 2007 the parties executed a second MOA in settlement of the agreement which provided, in part, that "[e]ffective 1/1/08: The health insurance prescription drug co-payment will increase for Empire Plan enrollees from \$2 to \$7."

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<sup>3</sup>Improper Practice Charge, Exhibit B.

<sup>4</sup>*Id.*

This MOA was also rejected by Council 82's membership. Neither MOA contains a proposal to eliminate the health insurance plans set forth in the parties' agreement in favor of a single plan.

Council 82 asserts that there was no proposal concerning health insurance co-pays discussed at pre-impasse negotiations and that a proposal presented for the first time at mediation cannot come before an interest arbitration panel. In support of this assertion, it cites to *City of Buffalo*, 30 PERB ¶¶4524 (1997). Council 82's reliance on this case is misplaced. In *City of Buffalo*,<sup>5</sup> the employer was found to have violated the Act by submitting a proposal for consideration at interest arbitration that had not been submitted at the bargaining table. In addition to *City of Buffalo*,<sup>6</sup> Council 82 cites to two other cases<sup>7</sup> in support of its argument that the City's health insurance proposal cannot be placed before an interest arbitration panel. Neither case, however, is on point or could be said to support Council 82's assertion that only proposals negotiated prior to impasse can be presented at interest arbitration.

The City argues, correctly, that mediation is an extension and continuation of negotiations, citing to *Village of Wappingers Falls*, 40 PERB ¶¶3020, *affg* 40 PERB ¶¶4529 (2007). It further asserts that the MOAs clearly show that the parties negotiated the issue of co-pay prior to interest arbitration. Although the City's proposal submitted to interest arbitration states that a formal proposal would follow, it is clear that the

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<sup>5</sup>*Supra.*

<sup>6</sup>*Id.*

<sup>7</sup>*Croton Police Assn*, 16 PERB ¶¶4603, *aff'd* 16 PERB ¶¶3100 (1983), where a violation was found when the union presented a proposal for the first time at arbitration; *Southold Town Police Benevolent Assn, Inc.*, 14 PERB ¶¶4613 (1981), where a violation was found when the union, in the absence of any prior notice or negotiations, presented a proposal for the first time at arbitration.

demand had been clarified and indeed amended by the parties' MOAs on the issue of co-pay following mediation.

On its face, the City's demand is vague. However, I find that it was subsequently clarified.<sup>8</sup> Further, Council 82 does not deny that the health insurance issue concerned an increase in co-pay from \$2.00 to \$7.00, and that it was negotiated either during or after mediation. Mediation is a continuation of negotiations. It appears that post-mediation the parties continued to negotiate and, in fact, reached agreement on the issue of co-pay. It is clear that the parties made a good faith effort to reach agreement on the issue. As a change in the amount of employees' co-payments under a prescription drug rider is mandatorily negotiable,<sup>9</sup> I find that the City's health insurance demand, as clarified, is properly before the interest arbitration panel.

**Article 10 – Hours of Work – Section 10.1.1**

Revise the language of the last sentence to read as follows:

Employees shall be required to attend a (15) minute roll call before the beginning of their regular shift, for which they will be compensated at the rate of \$650.00 payable in January prospectively for that calendar year.

Add:

Management may require certain positions to have flexible hours. For those positions management will meet with the union prior to the posting. Such meeting shall take place no later than two weeks after management requests it.

The City's proposal seeking to revise the existing contract language relative to roll call is mandatorily negotiable. It involves compensation and hours; both mandatory subjects of bargaining as set forth in §201.4 of the Act. As both changes in schedules

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<sup>8</sup>See *City of Hudson*, 40 PERB ¶4579 (2007).

<sup>9</sup>*County of Yates*, 22 PERB ¶3017 (1989).

and notice to the union of such changes are mandatorily negotiable,<sup>10</sup> the City's proposal seeking to add language to §10.1.1 regarding flexible hours is mandatory.

Council 82's argument that the flexible hours proposal is nonmandatory in that it establishes a waiver of its right to negotiate changes in schedules is unfounded. The same argument was raised in objection to a similar proposal in *Local 589, International Association of Firefighters, AFL-CIO and City of Newburgh*, 16 PERB ¶¶3030, affirming, 16 PERB ¶¶4516 (1983). There, the Board found that a proposal allowing an employer to make decisions regarding scheduling was mandatory. The Board dismissed the union's argument that the ability of the employer to act unilaterally deprived it of its right to bargain, observing that such argument went to the proposal's merit and not its negotiability.<sup>11</sup> Council 82's additional argument that the language of the proposal referencing "certain positions" can be read as affecting individuals outside the bargaining unit, thus rendering the entire proposal nonmandatory, is similarly rejected. Council 82's reliance on *Bridge and Tunnel Officers Benevolent Association, Inc.*, 15 PERB ¶¶3124 (1982) is misplaced. In that case, the at-issue proposal addressed specific titles that were not in the bargaining unit. As the language of the proposal, i.e. "certain positions," is followed by an affirmative duty to notify and meet with the union prior to changes, it can only be read to apply to unit members. To read it otherwise would render that language anomalous.

#### **Article 10 – Hours of Work – Section 10.3.3**

Add:

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<sup>10</sup>*City of Buffalo*, 14 PERB ¶¶3053 (1981); *Intl Union of Operating Engineers, Local 71-71A*, 23 PERB ¶¶3048 (1990).

<sup>11</sup>*Supra* at 3047.

Management may change the scheduling system for a valid police purpose with notification to the union for any unit within the department. Management agrees to meet with the union before implementation of the change. However such meeting shall take place no later than two weeks after management requests it.

Consistent with the analysis of the City's proposal to add to §10.1.1, discussed *supra*, this proposal is mandatorily negotiable. In addition to the arguments advanced by Council 82 with regard to the previous proposal, it argues that the City's proposal to add to §10.3.3 evidences an intent to reduce hours of work. Even if accurate, the demand would remain mandatory as hours of work are mandatory.

### **Article 11 – Overtime, Premium Pay, and Other Emoluments**

#### **§11.1.1 – Overtime Premiums Pay**

Add:

In the event overtime is needed for any valid police purpose and is not preplanned, management reserves the right to call in any department member with out regard to the seniority provisions of the CBA.

This proposal is mandatory in nature. Both procedures for assigning overtime<sup>12</sup> as well as call-in procedures<sup>13</sup> are mandatorily negotiable. Council 82's argument that the language "any department member" refers to persons outside the bargaining unit, thus rendering the proposal nonmandatory, is rejected. The reference in the proposal to the seniority provisions of the parties' agreement clearly indicates that the demand is intended to deal with unit employees only.

### **Article 14 – Paid Leaves - §14.2.1 – Personal Leave**

Add:

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<sup>12</sup>*City of Rochester*, 36 PERB ¶13003, (2003), *affg* 35 PERB ¶14601 (2002).

<sup>13</sup>*Troy Uniformed Firefighters Assn, Local 2304 IAFF*, 10 PERB ¶13015 (1977).

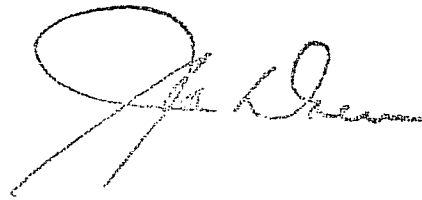
The department may take into account its overall mission for the particular period of time the personal leave was requested for and denied.

This proposal is preceded by contract language that provides for a specific number of earned personal leave days, the circumstances under which the leave can be used, and the reason for denying such leave, i.e., "such leave shall be denied solely on the basis that the employee's absence will seriously hamper or impede the work of the unit."<sup>14</sup> The City's proposal is nonmandatory as it is within the sole discretion of the City to determine the number of officers required to be available at any time.<sup>15</sup>

For the reasons set forth above, the City's proposal seeking to amend Article 14, §14.2.1 of the parties' agreement is nonmandatory and it is ordered to be withdrawn from interest arbitration.

Proposals as to Article 10, §§10.1.1 and 10.3.3, Article 11, §11.1.1, and Article 19 are mandatory and are properly submitted to interest arbitration.

Dated at Buffalo, New York,  
this 18th day of December, 2007



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Jean Doerr  
Administrative Law Judge

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<sup>14</sup>Agreement, Article 14, §14.2.1.

<sup>15</sup>*City of Newburgh*, 18 PERB ¶3065 (1985).