

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CITY OF ITHACA,

Charging Party,

-and-

CASE NO. U-35450

**ITHACA POLICE BENEVOLENT
ASSOCIATION, INC.,**

Respondent.

In the Matter of

**ITHACA POLICE BENEVOLENT
ASSOCIATION, INC.,**

Charging Party,

-and-

CASE NO. U-35494

CITY OF ITHACA,

Respondent.

**ROEMER WALLENS GOLD & MINEAUX LLP (EARL T. REDDING of
counsel), for City of Ithaca**

JOHN M. CROTTY, ESQ., for Ithaca Police Benevolent Association, Inc.

DECISION OF ASSISTANT DIRECTOR

On December 19, 2016, the City of Ithaca (City) filed an improper practice charge alleging that the Ithaca Police Benevolent Association, Inc. (PBA) violated § 209-a.2(b)

of the Public Employees' Fair Employment Act (Act) when it submitted to compulsory interest arbitration proposals for the period of January 1, 2012 through December 31, 2013, after PERB had issued its decision in *City of Ithaca (Ithaca I)*,¹ which held that the City had satisfied its duty to negotiate with the PBA for that same time period. The charge also alleged that three of the proposals submitted by the PBA are not arbitrable, one because it relates to City employees who retired on or before December 1, 2012, and two because they are vague and ambiguous. The PBA filed an answer, denying any violation of the Act and raising, as an affirmative defense, that the filing of a petition for interest arbitration is not an improper practice and that all the demands in the petition are mandatorily negotiable and arbitrable as of right.

On January 3, 2017, the PBA filed an improper practice charge alleging that the City violated § 209-a.1(d) of the Act in its response to the PBA's petition for compulsory interest arbitration, by submitting two demands that are either not mandatorily negotiable or prohibited subjects of bargaining. The City filed an answer, denying any violation of the Act and raising several affirmative defenses, including mootness, waiver, and that the City had satisfied its duty to bargain concerning calendar years 2012 and 2013.

These two cases were consolidated. At the June 7, 2017 prehearing conference in the consolidated matter, at which both parties were represented by counsel, the parties stipulated that there were no disputed factual issues and that the record in this matter consists of the charge in Case No. U-35450, including attachments; the answer in Case No. U-35450; the charge in Case No. U-35494, including attachments; the answer in Case No. U-35494; and the collectively negotiated agreement between the

¹ 49 PERB ¶ 3030 (2016).

City and the PBA for the period January 1, 2008 through December 31, 2011. The facts recited in this decision are based on the stipulated record. Both parties filed briefs.

FACTS

Procedural History

On or about March 8, 2012, the City and the PBA began negotiations for a successor to their 2008-2011 agreement. The PBA filed a declaration of impasse with PERB in July 2013. On January 14, 2014, the mediation process was formally terminated. The City, on or about May 12, 2014, filed a petition for compulsory interest arbitration pursuant to § 209.4 of the Act. By letter dated May 13, 2014, the PBA advised PERB's Director of Conciliation that it did not consent to arbitration and that it did not "waive or relinquish its rights under the Act to a continuation of the terms contained in the parties' expired collective bargaining agreement until such time as a successor agreement is reached...."² By letter dated May 30, 2014, the Director advised the City and the PBA that PERB would not process the City's petition.

By letter dated December 23, 2014, the City notified the PBA that it was ready to begin negotiating for a new collective bargaining agreement with a term beginning January 1, 2014. The PBA responded, demanding that negotiations continue for a successor agreement with a term beginning on January 1, 2012. On January 26, 2015, the City filed an improper practice charge alleging that the PBA had violated § 209-a.2(b) of the Act when it sought to negotiate a successor agreement with a term starting on January 1, 2012, because the PBA had waived its right to negotiate for 2012 and 2013 when it refused, in May 2014, to consent to compulsory interest arbitration.

On August 4, 2015, a decision was issued dismissing the City's charge in its

² Exhibit 3 to the charge in Case No. U-35450.

entirety because there was no record evidence that would permit a finding of a waiver of the right to negotiate, and because there was no support in PERB's existing case law for the conclusion that, inherent in the right of an employee organization to refuse to consent to interest arbitration, is a waiver of the right to negotiate over two years of a successor agreement.³ Both the City and the PBA filed exceptions to this decision.

The Board's decision in *Ithaca I* was issued on November 15, 2016, upholding the dismissal of the City's charge and the finding that there had been no waiver of the right to negotiate. The Board went on, however, to conclude that the stipulated facts established "a highly atypical instance of duty satisfaction, not of waiver."⁴ Specifically, the Board stated that the City had:

exhausted all available avenues for negotiation and conciliation, thereby satisfying its duty to negotiate in good faith under the Act for the applicable duration of an interest arbitration award, which we find here to be the presumptive default period of two years from the expiration of the previous agreement, that is, calendar years 2012 and 2013.⁵

On December 2, 2016, the PBA filed a petition for compulsory interest arbitration, attaching a document described in the petition as reflecting the terms and conditions of employment raised during negotiations, none of which were agreed upon during negotiations.⁶ These proposals by the PBA included increases in compensation, such as base wages, shift differentials, a lump sum payment on retirement, and the uniform allowance, all of which are specific to calendar years 2012 and 2013. In addition, the PBA included proposals concerning matters other than compensation, not specifically limited to calendar years 2012 and 2013, such as the grievance procedure, the eligibility

³ *City of Ithaca*, 48 PERB ¶ 4568 (2015), *affd*, 49 PERB ¶ 3030 (2016).

⁴ *Ithaca I*, 49 PERB ¶ 3030, at 3097.

⁵ *Id.*, at 3098.

⁶ Exhibit 8 to the charge in Case No. U-35450.

of retirees for health and dental insurance paid for by the City, changes to work schedules, holiday observance, and health insurance premiums. The PBA also submitted a proposal to amend Article 22 of the 2008-2011 agreement, entitled "Duration of the Agreement," which reads "This Agreement shall take effect of [sic] January 1, 2012 through December 31, 2013."⁷

By letter dated December 6, 2016, the City demanded that the Director of Conciliation permanently stay the PBA's petition based on *Ithaca I*. The City also filed a response to the PBA's 2016 petition, objecting to the PBA's petition in its entirety. The City's response also included the proposals the City submitted to arbitration, in the event that the arbitration was not stayed.

Also by letter dated December 6, 2016, the PBA opposed the City's demand to stay its petition, noting that the Board had made it clear, in *Ithaca I*, that the mechanism by which the substance of a petition for interest arbitration can be challenged is an improper practice charge.

By letter dated December 23, 2016, the Director of Conciliation issued a ruling declining to process the petition based on his conclusion that the PBA was "not eligible to pursue interest arbitration for changes in terms for the period of January 1, 2012 through December 31, 2013." The PBA thereafter filed exceptions to the Director's ruling.

On April 10, 2017, the Board issued its decision on the PBA's exceptions, reversing the Director's ruling.⁸ Citing to its decision in *City of Rensselaer*,⁹ and to § 205.6 of PERB's Rules of Procedure (Rules), the Board held that:

⁷ *Id.*

⁸ *City of Ithaca*, 50 PERB ¶ 3006 (2017) (*Ithaca II*).

⁹ 49 PERB ¶ 3016 (2016).

threshold questions of *eligibility* for interest arbitration and related procedural and substantive issues are delegated to the Director, while § 205.6 of the Rules directs that questions of substantive *arbitrability* are to be decided through an improper practice charge or a declaratory ruling proceeding [emphasis in original].¹⁰

The Board went on to characterize the objections of the City to the PBA's petition as "fundamentally concern[ing] the content of the PBA's specific demands, and whether the City's satisfaction of its duty to negotiate for the period in question renders these particular demands inappropriate between these parties...."¹¹ Finally, the Board expressly declined to discuss the propriety of the PBA's petition and specifically did not "address the exceptions, the response to the exceptions, or the submissions of amici to the extent they address the merits of the arbitrability of the at issue demand,"¹² noting that the arbitrability issue was raised in the instant improper practice proceeding.

The Current Case

On December 19, 2016, the City filed an improper practice charge (Case No. U-35450) alleging that, because the City had satisfied its duty to negotiate concerning calendar years 2012 and 2013, it could not be compelled to participate in interest arbitration concerning proposals specifically limited to that time frame. The City alleges that by "petitioning for Interest Arbitration and submitting the proposals set forth in Exhibit B [to the charge in Case No. U-35450] the PBA has violated the Act." However, in its brief in this case the City states that "it is not the City's contention that the PBA's IA Petition filing is an improper practice....The City's arbitrability objection goes to the substance of the PBA's IA Petition, not to its mere filing."¹³

¹⁰ *Ithaca II*, 50 PERB ¶ 3006, at 3029.

¹¹ *Id.*, at 3030.

¹² *Id.*, at 3031.

¹³ Brief of the City of Ithaca, at 11-12.

In its charge, the City also challenged three of the PBA's proposals as independently not arbitrable. According to the charge, the PBA's proposal concerning Article 3,¹⁴ Section D – Retirement Fund Account, is not arbitrable because it "relates to employees who retired on or before December 1,¹⁵ 2012."¹⁶ The City also alleges that the PBA's proposal concerning Article 13, entitled "EMPLOYEE RIGHTS IN DISCIPLINARY MATTERS," which proposes changes to Section H of that article, is vague and ambiguous. Finally, the City alleges that the PBA's proposal concerning Article 16 – "GRIEVANCE PROCEDURE," is also vague and ambiguous.

On January 3, 2017, the PBA filed an improper practice charge (Case No. U-35494) challenging the arbitrability of the City's proposal for a new management rights clause as nonmandatory, and its proposal regarding retirement system enrollment and participation as prohibited. The City's management rights proposal adds a new Article 3, which states:

The management of the Department, the control of its properties and the maintenance of order and efficiency are the responsibilities of the City. Accordingly, except where expressly limited by this Agreement the City shall have the sole and exclusive right to direct and manage the Department, including, but not limited to, the following rights: to determine the size, composition, and organization of the Department and any sub-units therein; to determine the facilities and equipment to be utilized and/or maintained; to select and direct employees of the Department; to hire, assign, promote, or transfer; to suspend, discharge, or otherwise take disciplinary action; to determine the amount of overtime to be worked; to decide on the number of employees needed; to determine the work to be performed, amount of supervision necessary, equipment, methods, hours, and schedules, together with the practices, methods, and means by which Departmental operations are to be conducted; to make reasonable and binding work rules not inconsistent with this Agreement, and to amend such rules from time to time, which changes will be discussed with the

¹⁴ The charge, at paragraph 22A, references Article 4, Section D. The correct article is Article 3; Section D.

¹⁵ The City's brief references January 1, not December 1, 2012.

¹⁶ Charge in Case No. U-35450, paragraph 22A.

Association upon request; and, to otherwise take whatever actions are necessary to carry out the mission of the City pursuant to existing practices unless altered by this Agreement.¹⁷

The City's Article 4 proposal concerning retirement system enrollment and participation states:

Retirement. The City agrees to continue to provide the Section 384-d (20 year) retirement plan, and Section 375-l New Career Plan and Section 302-9D Final Average Salary retirement plan (Tier I members only), and to continue to make payments for the contributions of all members of the police department who who are now, or shall become in the future, members of the New York State Retirement System joined the retirement system when there was no contribution required.

All members hired on or after January 9, 2010 shall participate in the New York State Police and Fire Retirement System in accordance with and subject to the provisions of the Statutes of the State of New York now applicable or as they may hereafter be amended or added.¹⁸

DISCUSSION

Pursuant to § 205.6 of the Rules, entitled Objections to Arbitration, "[o]bjections to the arbitrability of any matter set forth in the petition [for compulsory interest arbitration] or response may only be raised by the filing of an improper practice charge or a declaratory ruling petition pursuant to the requirements of this section." Section 205.6 includes three expressly non-exclusive bases for such objections: that "a matter proposed is not a mandatory subject of negotiations;" or was not "the subject of negotiations prior to the petition;" or "had been resolved by agreement during the course of negotiations."¹⁹

In *Ithaca II* the Board stated that:

¹⁷ Exhibit A to the City's response to the PBA's petition, attached to the PBA's charge in Case No. U-35494. The expired agreement did not contain a management rights clause.

¹⁸ *Id.*

¹⁹ Rules, § 205.6.

the text of § 205.6 of the Rules makes clear that disputes as to whether the subject matter of a particular demand renders that demand outside of the permissible scope of interest arbitration fall within that rule's ambit, regardless of whether the basis for the objection is expressly contemplated by § 205.6 of the Rules or not.²⁰

In *Ithaca I*, the Board equally clearly stated that the City had, by exhausting "all statutory negotiation and conciliation processes in good faith," satisfied its duty to negotiate for calendar years 2012 and 2013.²¹ Nevertheless, the PBA thereafter chose to file a demand for arbitration with all of its proposals limited to calendar years 2012 and 2013. *Ithaca I* and *Ithaca II*, read together, require a finding that the PBA's proposals to change terms and conditions of employment for this same period are outside the permissible scope of arbitration in this case. In the context of an improper practice charge concerning the scope of arbitration, I have no authority to find that the petition is improper, only that the proposals themselves violate § 209-a.1(d) of the Act. Having so found, the PBA must withdraw all of the proposals submitted with its 2016 demand for arbitration.²²

As the PBA's proposals must be withdrawn, there is no need for me to reach the City's alternative argument that three PBA proposals are allegedly not arbitrable due to vagueness, ambiguity or some other impropriety.

With respect to the PBA's challenge to two of the City's proposals submitted in response to the PBA's 2016 demand for arbitration, I find that the City's proposed new management rights clause is not properly submitted to compulsory interest arbitration. This clause references subjects that are both mandatorily negotiable (disciplinary procedures;

²⁰ 50 PERB ¶ 3006, at 3030.

²¹ 49 PERB ¶ 3030, at 3097.

²² In light of this finding, I do not reach the City's collateral estoppel and res judicata defenses.

hours; and schedules) and management prerogatives (mission; equipment; facilities; methods of operation; size, composition and organization of the police department; and determining the amount of overtime to be worked). In addition, this clause also includes management's right to make and amend reasonable and binding work rules, which could, of course, cover rules on both nonmandatory and mandatory subjects.

This demand is a nonmandatory unitary demand. A unitary demand is a proposal containing multiple sections "which cannot be reasonably understood to constitute severable and independent proposals."²³ This proposal is separated into two sentences, but the second sentence is clearly intended to define the first. The second sentence is separated into clauses that specify the City's "sole and exclusive right to direct and manage" the police department subject only to the express limitations on that right contained in the collective bargaining agreement. These clauses do not constitute independent proposals.

The PBA challenges the City's retirement proposal as not arbitrable because "all forms of demands relating to retirement benefits"²⁴ are prohibited pursuant to § 201.4 of the Act and § 470 of the Retirement and Social Security Law (RSSL). Section 201.4 of the Act defines "terms and conditions of employment" and states that this phrase does not include "any benefits provided by or to be provided by a public retirement system. . . . No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void." RSSL § 470 states:

Changes negotiated between any public employer and public employee, as such terms are defined in section two hundred one of the civil service law, with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income

²³ *Highland Falls Patrolmen's Benev Assn, Inc.*, 42 PERB ¶ 3020, 3072 (2009).

²⁴ PBA's brief in Case No. U-35494, at 3.

for retirees or payment to retirees or their beneficiaries, shall be prohibited.

The City asserts, and the PBA does not attempt to dispute this assertion, that its retirement proposal merely restates statutory benefits, updating language to comply with current state law. RSSL § 470 only prohibits the negotiation of *changes* to retirement benefits. Therefore, a contractual provision which merely restates the law would not violate RSSL § 470.

The Court of Appeals addressed § 201.4 of the Act in *City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*.²⁵ In that case, the Court analyzed a provision in the parties' expired collective bargaining agreement, which restated the retirement benefits already available to unit members by law. The Court acknowledged the language of § 201.4 of the Act, stating that the parties "are prohibited from negotiating and granting retirement benefits that are not already expressly provided under state law," but went on to note that a collective bargaining agreement "may provide for retirement benefits as authorized by law."²⁶ The city's retirement proposal is not, therefore, a prohibited subject.²⁷

Having found the City's management rights proposal nonmandatory, I must address the PBA's argument that the appropriate remedy for any violation of the Act by

²⁵ 20 NY3d 651 (2013).

²⁶ *Id.*, at 656.

²⁷ It should be noted that, even though the PBA has not objected to the City's retirement proposal as nonmandatory, PERB has held that language which merely restates statutory benefits is a nonmandatory subject of negotiation. See *City of Rochester*, 12 PERB ¶ 3010 (1979). Where, as here, the proposal seeks to modify language already contained in the parties' expired agreement, which is also nonmandatory, the proposal is converted to a mandatory subject pursuant to *City of Cohoes*, 31 PERB ¶ 3020 (1998), *confd sub nom Uniformed Firefighters of Cohoes, Local 2562 v Cuevas*, 32 PERB ¶ 7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶ 7019 (3d Dept 2000).

the City includes the dismissal of the City's response in its entirety. The PBA asserts that the Board's decision in *Rensselaer* requires, or at least supports, the dismissal of the City's response in this case.

In *Rensselaer*,²⁸ the City of Rensselaer Police Officers Union, Inc. (Union) filed a petition for interest arbitration, and PERB's Office of Conciliation designated a public interest arbitration panel pursuant to § 209.4 of the Act. The City then filed its response to the petition. The City also filed an improper practice charge challenging arbitrability on the ground that the Union's petition improperly included proposals for terms and conditions of employment for civilian dispatchers who, while members of the bargaining unit represented by the Union, are statutorily excluded from interest arbitration. In light of the information in the charge, the Director of Conciliation concluded that as civilian dispatchers were clearly not eligible for arbitration, the Union's petition was "nullified" and the arbitration panel was dissolved.²⁹ The Director advised the parties that "[f]urther proceedings under CSL §209.4 should cease until such time as a revised or otherwise permissible petition is filed with this office."³⁰

The Board found no abuse of discretion in the Director's decision to nullify the petition and dissolve the panel, as eligibility determinations are "within the exclusive province of the Director, subject to the Board's review."³¹ The Board found that the Director had:

contemplated that the Union would simply correct its petition and re-file upon receipt of his ruling. Any delay in obtaining an interest arbitration award occasioned by the Union's decision to appeal the Director's decision rather than simply re-filing an appropriate petition excluding

²⁸ 49 PERB ¶ 3016.

²⁹ *Id.*, at 3064.

³⁰ *Id.*

³¹ *Id.*, at 3066.


positions that are not entitled to interest arbitration cannot be attributed to the Director.³²

The Board rejected the Union's contention that it should "effectively redraft the petition to eliminate demands relating to civilian dispatchers by dismissing such claims . . . as the framing of proper proposals for interest arbitration is the duty of the parties and not of the Board."³³

The PBA's argument that the City's response to the petition must be dismissed in its entirety upon a finding that one of the City's proposals is not arbitrable completely ignores the critical distinction between a determination by the Director of Conciliation that a petition was filed on behalf of individuals not eligible for arbitration and an improper practice charge concerning the arbitrability of specific demands. The Board made this distinction very clear in *Rensselaer* and in *Ithaca II*. I see nothing in either case that would permit the application of a remedy appropriate in connection with a determination concerning eligibility to participate in compulsory interest arbitration to the remedy for an improper practice charge concerning the scope of negotiations.

IT IS, THEREFORE, ORDERED that the PBA withdraw from arbitration all of the proposals submitted with its 2016 demand for arbitration and that the City withdraw its proposal for a new management rights clause.

Dated at Albany, New York
this 30th day of January, 2018



Nancy L. Burritt
Assistant Director

³² *City of Rensselaer*, 49 PERB ¶ 3017, at 3066.

³³ *Id.*

The following is an extract of PERB's Rules of Procedure, 4 N.Y.C.R.R. Parts 200-215. Any party filing exceptions or other papers with the Board should consult the Rules of Procedure to ensure compliance with all requirements. The Rules are available at: <http://perb.ny.gov/PERBRules.asp>.

Exceptions to Decision of Director; Exceptions to Administrative Law Judge's (ALJ) Decision and Recommended Order; Action by Board

(a) Within 15 working days after receipt of the decision of the Director or the decision and recommended order of the ALJ, a party may file with the Board an original and four copies of a statement in writing setting forth any exceptions thereto, and a separate original and four copies of a brief in support thereof, together with proof of service of copies of such exceptions and brief upon each party. A copy of such exceptions and briefs shall be simultaneously served upon all other parties.

(b) The exceptions shall:

- (1) Set forth specifically the questions of procedure, fact, law or policy to which exceptions are taken;
- (2) Identify that part of the decision or order to which objection is made;
- (3) Designate by page citation the portions of the record relied upon; and
- (4) State the grounds for exceptions. An exception to a ruling, finding, conclusion or recommendation which is not specifically urged is waived.

(c) The Board shall not determine violations of the Act and affirmative defenses that were not properly pled.

Cross-Exceptions

Within seven working days after receipt of exceptions, any party may file an original and four copies of a response thereto, or cross-exceptions and a separate brief in support thereof, together with proof of service of copies of these documents upon each party to the proceeding. Within seven working days after receipt of cross-exceptions, any party may file an original and four copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding.

Request for Extension of Time

A request for an extension of time within which to file exceptions and briefs shall be in writing, and filed with the Board before the expiration of the required time for filing, provided that the Board may extend the time during which to request an extension of time because of extraordinary circumstances. A party requesting an extension of time shall notify all the parties to the proceeding of its request and shall indicate to the Board the position of each other party with regard to such request.

Objection to Certification Without Election

A written objection to the Director's determination that an employee organization should be certified without an election may be filed within five working days after receipt of the Director's determination. A party may file a response to the objection within five working days after its receipt of the objection. The objection and any response must be served on all parties.

Oral Argument Before the Board

If a party desires to argue orally before the Board, a written request with reasons therefore shall accompany the exceptions filed, the response thereto, or the cross-exceptions filed and be prominently displayed on the first page of the party's papers. The Board may grant such a request; it may also direct oral argument on its own motion.

Board Action

(a) Upon receipt of the case, the Board may adopt, modify or reverse the Director's or ALJ's decision or order.

(b) Unless a party files exceptions to the decision and recommended order of the Director or ALJ within 15 working days after receipt thereof, the decision and any accompanying order will be final, except that the Board may, on its own motion, decide to review any remedial action recommended within 20 working days after receipt by the parties of the decision and recommended order.

Party

The term "party", as used in PERB's Rules of Procedure, means any public employee, employee organization or public employer filing a charge, petition or application under the Act or these Rules; any public employee, employee organization or public employer named as a party in a charge, petition or application, filed under the Act or these Rules; or any other public employee, employee organization or public employer whose timely motion to intervene in a proceeding has been granted.

Working Days

The term "working days", as used in PERB's Rules of Procedure, shall not include a Saturday, a Sunday, or a legal holiday.

Filing; Service

(a) The term "filing", as used in PERB's Rules of Procedure, shall mean delivery to the Board or an agent thereof, or the act of mailing to the Board, or deposit with an overnight delivery service for overnight delivery.

(b) The term "service", as used in PERB's Rules of Procedure, shall mean delivery to a party or the act of mailing to a party, or deposit with an overnight delivery service for overnight delivery.

NOTICE TO PARTIES

Judicial Appeal of Board Orders.

A party may appeal a final order of the Board by filing with the court and serving the necessary parties the pleadings and papers required by Article 78 of the New York Civil Practice Law and Rules (CPLR) and New York Civil Service Law (CSL) §213 within thirty days after service of the Board's order. The Board's "filing" and "service" definitions (above) do not govern the filing and service requirements of the CPLR or CSL, which are covered by the terms of those statutes. Failure to comply with a final order of this agency will result in an enforcement proceeding in New York Supreme Court pursuant to CSL §213.