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Arthur S. Leonard
New York Law School

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COLLECTIVE BARGAINING ON ISSUES OF HEALTH AND SAFETY IN THE PUBLIC SECTOR: THE EXPERIENCE UNDER NEW YORK'S TAYLOR LAW

ARTHUR S. LEONARD*

The New York Public Employees' Fair Employment Act,¹ commonly known as the "Taylor Law," imposes upon public employers in New York State a duty to negotiate with labor organizations representing their employees with respect to "terms and conditions of employment."² Working conditions affecting employee health and safety are frequently the subject of bargaining demands by public sector unions in New York, and the Public Employment Relations Board (PERB), the agency charged with administration of the Taylor Law,³ has often grappled with the question whether a particular health and safety demand comes within the scope of the statutory negotiating duty.

Demands related to health and safety issues require PERB to confront a fundamental dilemma inherent in public sector collective bargaining: to what extent should a public employer's basic policy decisions with respect to the manner and means of providing public services (which decisions are *not* subject to collective bargaining) be subject indirectly to the negotiation process, given the Taylor Law's policy of allowing public employees to negotiate

* Assistant Professor of Law, New York Law School. Cornell University, B.S., 1974; Harvard University, J.D., 1977. This Article was written while the author was associated in law practice with the New York office of Seyfarth, Shaw, Fairweather and Geraldson.

1. N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973) [hereinafter cited as Taylor Law]. The Taylor Law was enacted in 1967 as a substitute for the restrictive Condon-Wadlin Act of 1947. The Taylor Law is modeled in many respects on the National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151-68 (1976), as amended. For a brief history of public sector labor law in New York State, see W. NEWHOUSE, PUBLIC SECTOR LABOR RELATIONS LAW IN NEW YORK STATE § 1.02 (1978).

2. Taylor Law, § 204(2).

3. The Public Employment Relations Board [hereinafter cited as PERB], established in § 205 of the Taylor Law, is the administrative agency analogous to the National Labor Relations Board in the private sector. Its functions include certification of bargaining representatives, imposition of strike penalties on labor organizations, adjudication of unfair employment practice charges, and conduct of the multi-faceted dispute resolution mechanisms provided in the statute.

about their "terms and conditions" of employment?⁴ It is the thesis of this Article that PERB has not found a fully satisfactory resolution to this problem in the health and safety area. Indeed, while appearing to restrict the scope of negotiations by holding that particular demands relating directly to the manner and means of providing service to the public are *not* directly subject to the bargaining requirement, PERB has allowed the labor organizations to develop many "back door" approaches to negotiating about the very subjects which had seemed to be ruled not negotiable.⁵ In so doing, PERB has set the stage for potential confrontations of great public impact as new laws dealing with public sector health and safety take effect and begin to be enforced by other state agencies.⁶

I. THE NEGOTIATION FRAMEWORK: MANDATORY V. PERMISSIVE SUBJECTS

Under the Taylor Law, the scope of mandatory negotiations is defined by the phrase "terms and conditions of employment."⁷ In an early opinion discussing this phrase, *City School District of the City of New Rochelle*,⁸ PERB described the subjects of bargaining to consist generally of "salaries, wages, hours and other conditions

4. In *Board of Educ. of Union Free School Dist. No. 3 v. Associated Teachers of Huntington, Inc.*, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972), the court of appeals held that *any* subject (e.g., length of work year) which constituted a "term or condition of employment" was subject to mandatory negotiation. 30 N.Y.2d at 127, 282 N.E.2d at 112, 331 N.Y.S.2d at 21. However, in *West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720 (1974), the court noted that subjects affecting basic questions of how a public service is provided (e.g., school class size) were negotiable only with respect to their *impact* on terms and conditions of employment. 35 N.Y.2d at 50-52, 315 N.E.2d at 777-78, 358 N.Y.S.2d at 722-24. For a summary of rulings in several states with respect to scope of public sector negotiations, see Annot., 84 A.L.R.3d 242-313 (1978).

5. These "back door" approaches, discussed *infra*, include "impact" bargaining, hazardous duty pay, and grievance arbitration with respect to health and safety issues.

6. Particularly noteworthy in this regard are the New York Toxic Substances Law, N.Y. PUB. HEALTH LAW §§ 4800-08 (McKinney Supp. 1981-82), N.Y. LAB. LAW §§ 875-83 (McKinney Supp. 1981-82), and the New York State Occupational Safety & Health Law, N.Y. LAB. LAW § 27-a (McKinney Supp. 1981-82) [hereinafter cited as SOSHA]. Enforcement responsibility for the Toxic Substances Law is vested in the Health Commissioner, N.Y. PUB. HEALTH LAW § 4802, the Industrial Commissioner, N.Y. LAB. LAW §§ 876 and 880, and the Attorney General, *id.* at § 882. SOSHA is enforced by the Industrial Commissioner and the Attorney General. SOSHA § 27-a.

7. Taylor Law § 204. "Public employers are hereby empowered to recognize employee organizations for the purpose of negotiating collectively in the determination of . . . [the] terms and conditions of employment of their public employees . . ." *Id.*

8. 4 P.E.R.B. ¶ 3060 (1971).

of employment.”⁹ PERB noted the similarity of its statutory bargaining definition with that contained in the National Labor Relations Act,¹⁰ but observed that, as expressly required by the Taylor Law, PERB had to recognize “fundamental distinctions between private and public employment,” and to refrain from giving “binding or controlling” precedential value to state or federal private sector law with respect to the scope of mandatory bargaining.¹¹

In the *New Rochelle* case, PERB embraced the three-part scheme with respect to classification of bargaining proposals (*i.e.*, mandatory, permissive, illegal) which has been developed by the National Labor Relations Board (NLRB) and the federal courts,¹² but stated that the peculiar status of public employers as governmental bodies introduced special considerations with respect to determining whether a bargaining proposal fell within the mandatory category:

A public employer exists to provide certain services to its constituents, be it police protection, sanitation or, as in the case of the employer herein, education. Of necessity, *the public employer*, acting through its executive or legislative body, *must determine the manner and means by which such services are to be rendered and the extent thereof*, subject to the approval or disapproval of the public so served, as manifested in the electoral process [*sic*] *Decisions of a public employer with respect to the carrying out of its*

9. *Id.* at 3705.

10. “[T]o bargain collectively is the performance of the mutual obligation of the employer and the [union] to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment . . .” 29 U.S.C. § 158(d) (1976). When construing this provision, the National Labor Relations Board has frequently recognized employee health and safety to be a mandatory subject for collective bargaining. *Carbonex Coal Co.*, 248 N.L.R.B. 779 (1980); *J.P. Stevens & Co.*, 239 N.L.R.B. 738 (1978), *modified on other grounds*, 623 F.2d 322 (4th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *Electri-Flex Co.*, 238 N.L.R.B. 713 (1978), *enforced*, 104 L.R.R.M. 2612 (7th Cir. 1979); *Gulf Power Co.*, 156 N.L.R.B. 622, *enforced*, 384 F.2d 822 (5th Cir. 1967).

11. 4 P.E.R.B. at 3706; Taylor Law § 209-a(3). One such fundamental difference is that New York public sector unions and their members may be subjected to harsh financial penalties and loss of status if they strike in support of their negotiating demands. *Id.* at §§ 210-11. Furthermore, police and fire department employees are provided with a mandatory arbitration procedure to resolve their disputes over new contract terms, *id.* at § 209(4), as are employees of the City of New York. N.Y. ADMIN. CODE ch. 54, §§ 1173.10-13.0 (1967).

12. The federal scheme for classification of bargaining topics in the private sector provides that employers *must* bargain with respect to mandatory subjects, *may* bargain with respect to permissive subjects, and *may not* be requested to bargain with respect to illegal subjects. The bargaining duty arises once a labor organization has been certified or formally recognized by the employer and requests bargaining. *Fibreboard Paper Prods. Corp. v. N.L.R.B.*, 379 U.S. 203 (1964); *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *N.L.R.B. v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees. Here there must be noted a substantial difference between private employers and public employers, for the latter "owe a very special obligation to the public not owed by private employers . . ." This is not to say, however, that an employee organization is precluded from seeking negotiations concerning such decisions on a permissive basis.¹³

Thus, PERB took the position that public employee unions could not require negotiations with respect to basic policy decisions of public employers having to do with the "carrying out" of their "missions."¹⁴ Despite this superficially clear-cut pronouncement, however, the process of line drawing by PERB between "mandatory" and "permissive" negotiating subjects has not been easy or consistent, because many, if not most, subjects have numerous implications for the manner or means of providing the public service which is the "mission" of the public employer.

PERB holds that a public employer may not be compelled to negotiate about the *substance* of its public mission, the *methods* it selects to fulfill that mission, or similar issues which may affect terms and conditions of employment.¹⁵ However, the employer can be compelled to negotiate about the *impact* of such decisions on employment terms and conditions.¹⁶ A primary example of this policy is the issue of class size in educational institutions. A school board or administration may not be compelled to negotiate about class size, *per se*, which is a question of educational policy.¹⁷ However, in *Yorktown Faculty Association*,¹⁸ PERB held that a union

13. 4 P.E.R.B. at 3706-07 (emphasis supplied, footnotes omitted).

14. This position was confirmed by the court of appeals in *West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720 (1974).

15. *New Rochelle*, 4 P.E.R.B. ¶ 3060, at 3706; see *West Irondequoit Bd. of Educ.*, 4 P.E.R.B. ¶ 3070 at 3727 (1971), *aff'd*, 42 A.D.2d 808, 346 N.Y.S.2d 418 (3d Dep't 1973), *aff'd*, 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720 (1974).

16. As PERB stated in *West Irondequoit*:

Nevertheless, impact is a matter for negotiations. Thus, it is not the thrust of this decision that an employer is not required to negotiate on subjects which affect the allocation of resources because salaries clearly have such an effect; rather, the thrust of this decision . . . is that basic policy decisions as to the implementation of a mission of an agency of government are not mandatory subjects of negotiations.

4 P.E.R.B. at 3727. This statement was quoted with approval by the court in *West Irondequoit*, 35 N.Y.2d at 51, 315 N.E.2d at 778, 358 N.Y.S.2d at 723.

17. *West Irondequoit Bd. of Educ.*, 35 N.Y.2d at 49, 315 N.E.2d at 776, 358 N.Y.S.2d at 721.

18. 7 P.E.R.B. ¶ 3030 (1974).

may demand negotiations on the subject of teacher workloads, which are computed by taking into account many factors, including class size, number of classes, length of classes, and ancillary student contact duties. The figure resulting from such calculations, known as "weighted student contact minutes" (WSCM), can be the subject of negotiations, because, among other things, it has a direct bearing on wages (*i.e.*, how much pay for how much work). Once a particular WSCM has been negotiated, a school employer may have to reduce class size or the number of classes assigned to individual teachers in order to comply with the contractual limitations on teacher workload, because the number of students assigned to a class is one of the variables in the calculation of the WSCM.¹⁹

Similar logic runs through PERB's other decisions on whether particular health- and safety-related demands constitute mandatory negotiation subjects. PERB's stated preference is for parties to establish joint procedures and mechanisms, such as a joint safety committee, which can then consider safety issues on a case-by-case basis in light of the individual facts of each case, or to adopt a general safety clause in their collective agreements, leaving to their grievance arbitration mechanism the resolution of disputes about violations of the clause. One general safety clause approved as a mandatory subject by PERB reads as follows: "The Employer agrees to endeavor to provide safety standards for the protection of employees' well-being commensurate with those presently in effect in the private sector and to provide and maintain safe and healthful working conditions and to initiate and maintain operating practices that will safeguard employees."²⁰

As to the creation of a joint committee, PERB states:

Safety as a general subject is a mandatory subject of negotiations. To attempt to provide in an agreement all aspects of safety would be an exercise in futility in that one could not anticipate in specific language all possible eventualities We submit that no labor contract can be drafted to provide for all eventualities.

We suggest that the parties through the negotiating process could create a joint safety policy committee that operates under general guidelines that are recited in the contract to consider issues of safety This process could be made subject to the grievance arbitration procedure. A demand to

19. Yorktown Faculty Ass'n, 7 P.E.R.B. ¶ 3030 (1974); West Irondequoit Bd. of Educ., 4 P.E.R.B. ¶ 3070 (1972), *aff'd*, 42 A.D.2d 808, 346 N.Y.S.2d 418 (3d Dep't 1973), *aff'd*, 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720 (1974).

20. CSEA, Niagara Chapter, 14 P.E.R.B. ¶ 3049, at 3081 (1981).

establish such a joint safety policy committee would be a mandatory subject of negotiations.²¹

The creation of such mechanisms to resolve safety disputes may appear to be a reasonable "easy way out" of the dilemma faced by PERB. On the one hand, PERB is not requiring the employer to negotiate directly about substantive issues which relate both to public service policies and safety, such as the number of firemen assigned to a hook-and-ladder device, or the type of firearms to be issued to police officers on night foot-patrol. On the other hand, PERB is requiring the employer to negotiate about creation of a *mechanism* which may well compel the employer to alter just such policies at the behest of the union. In the examples cited above, the unions might file grievances claiming that the employer's policy decisions with respect to the number of firemen assigned or the type of firearms issued violate the contract's general safety clause. If an arbitrator were to be persuaded that the union's position was correct, the arbitrator could order the employer to change its policy.²² The policy decision is thus taken out of the employer's hands indirectly through arbitration. The parties could negotiate a restrictive arbitration provision depriving the arbitrator of authority to consider safety questions which affect the manner and means of providing public services, but such a restrictive arbitration clause would obviously vitiate the usefulness of the "joint mechanism" approach urged by PERB.

21. White Plains P.B.A., 9 P.E.R.B. ¶ 3007, at 3010-11 (1976).

22. Although the arbitrator's decision would be subject to judicial review, it would not necessarily be set aside merely because a public policy question was involved. Former Chief Judge Breitel has commented that an arbitrator's award must amount to "gross illegality" to justify a court setting it aside. *Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n*, 45 N.Y.2d 411, 422, 380 N.E.2d 280, 286, 408 N.Y.S.2d 453, 459 (1978); *accord*, *Port Jefferson Station Teachers Ass'n, Inc. v. Brookhaven-Comsewogue Union Free School Dist.*, 45 N.Y.2d 898, 383 N.E.2d 553, 411 N.Y.S.2d 1 (1978). Indeed, the court of appeals has held that, when a policy question is *not* implicated, an arbitrator's award is to be enforced even if it rests on an incorrect application of law, so long as it is not "completely irrational." *Rochester City School Dist. v. Rochester Teachers Ass'n*, 41 N.Y.2d 578, 362 N.E.2d 977, 394 N.Y.S.2d 179 (1977). The court has refused to enforce an award granting a teacher tenure, *Legislative Conference of CUNY v. Board of Higher Educ.*, 31 N.Y.2d 926, 293 N.E.2d 92, 340 N.Y.S.2d 924, *modifying and affirming*, 38 A.D.2d 478, 330 N.Y.S.2d 688 (1st Dep't 1972), or an award ordering appointment of a grievant to a new job which had not been established pursuant to required civil service procedures, *CSEA, Inc. v. Town of Harrison*, 48 N.Y.2d 66, 397 N.E.2d 350, 421 N.Y.S.2d 839 (1979). In both instances, there was a particular provision of state law which would render enforcement of the arbitrator's award patently unlawful.

II. PERB RULINGS ON PARTICULAR NEGOTIATION DEMANDS

A. Staffing

Perhaps the most frequently recurring negotiation demands related to health and safety, and the most difficult with which PERB has had to deal, are demands related to staffing in the areas of police and firefighters.²³ They are frequently couched in terms of health and safety, especially where they relate to crew size on a specific piece of equipment or number of employees to be deployed in a specific situation.²⁴

PERB initially dealt with the staffing issue by ruling that total staffing (the number of employees in a police force or in a fire department) was not a mandatory subject, but that crew size "per piece of equipment" was negotiable "as to safety aspects."²⁵ However, in January, 1976, in *White Plains P.B.A.*,²⁶ PERB reconsidered its previously-stated position and decided to abandon it:

We now reconsider our conclusions in the earlier *White Plains* and *Albany Police Officers* cases. In doing so we find the safety aspects of duties assigned to police or firefighters no less compelling. We support the concept that such dangers or perils should be minimized. However, we do not believe that each negotiating demand should be scrutinized through the vehicle of a hearing as to safety considerations. This would cripple the negotiating process and our expedited procedure for resolving scope issues. We submit that these safety considerations, as important as they are, can be dealt with in a manner more compatible to the negotiating process and in a manner that can

23. Because mandatory subjects of negotiation in the police and fire areas are subject to compulsory interest arbitration in the event of a bargaining impasse, PERB's decisions in those areas are of particular importance with respect to the policy dilemma previously described. If a bargaining demand is not a mandatory subject, the employer may refuse to negotiate about it, and it may not be presented to the "interest arbitration" panel for consideration. "Interest arbitration" is a term used to describe binding arbitration over new contract terms, as differentiated from "rights" or "grievance" arbitration, which deals with the settlement of disputes between the contracting parties over their existing contractual rights.

24. It was settled early in the history of the National Labor Relations Act that "number of employees" or "crew size" are mandatory subjects of bargaining in the private sector. *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), *enf. denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

25. The *New Rochelle* decision, 4 P.E.R.B. ¶ 3060 (1971), established the general principle that staffing *per se* was not a mandatory subject. In *City of White Plains*, 5 P.E.R.B. ¶ 3008 (1972) and *City of Albany*, 7 P.E.R.B. ¶ 3078 (1974), PERB carved out a specific exception for staffing with respect to particular equipment or assignments where the union could establish a significant safety factor in its negotiation demand.

26. 9 P.E.R.B. ¶ 3007 (1976).

deal with safety considerations more realistically and more efficaciously.²⁷

PERB held that the P.B.A.'s demand for two employees in all patrol cars was not a mandatory negotiation issue, and recommended to the parties that they negotiate instead about forming a joint safety committee, which could then decide whether two employees should be assigned in particular circumstances without setting a general minimum staffing requirement.²⁸

A similar demand arose in *I.A.F.F. of Newburgh, Local 589*,²⁹ where firefighters demanded a minimum crew size for each "rig." Once again, PERB had to decide whether the demand was essentially a safety demand, or rather primarily a demand with respect to manpower and deployment policy. PERB's conclusion, consistent with its decision in *White Plains P.B.A.*,³⁰ was that this was primarily a staffing demand rather than a safety demand:

While the record in the investigatory hearing indicated that rig manning may have certain aspects of safety, it does not establish that the subject is *predominantly* one of safety . . . [T]he predominant characteristic of the rig manning demand is that of manpower and the deployment of firefighters. Thus, *the demand is essentially one of management prerogative as to how best to service public safety needs and is not a mandatory subject of negotiation*. Accordingly, while we conclude that a demand in general terms for firefighters' safety is a mandatory subject of negotiation, we determine that the specific demand for a "minimum number of men that must be on duty at all times per piece of fire fighting equipment" is not . . . [W]e are not dealing with a subject directly affecting only the employer and employee relationship, but rather we are dealing with a basic element of governmental policy bearing upon the extent and quality of service to the public.³¹

As noted previously, however, PERB's recommendation to the parties in these cases (to leave such issues to grievance arbitration) undercuts the rationale PERB employs in deciding that the negotiating demands are not mandatory subjects. Thus, if the decision

27. *Id.* at 3010.

28. *Id.* at 3010-11.

29. 10 P.E.R.B. ¶ 3001, *aff'd*, 59 A.D.2d 342, 399 N.Y.S.2d 334 (3d Dep't 1977).

30. 9 P.E.R.B. ¶ 3007 (1976).

31. *I.A.F.F. of Newburgh*, 10 P.E.R.B. at 3003 (citation omitted, emphasis supplied in part). In *City of New Rochelle v. Crowley*, 61 A.D.2d 1031, 403 N.Y.S.2d 100 (2d Dep't 1978), the court approved a similar PERB ruling with respect to a staffing demand, noting that PERB had "established an eminently reasonable balance between the conflicting considerations involved" (61 A.D.2d at 1032, 403 N.Y.S.2d at 102) by urging the parties to negotiate about creating a health and safety committee to resolve such problems on a case-by-case basis.

whether to deploy two police employees on foot or auto patrol is a managerial policy question when proposed by the union as a contractual requirement, why is it any less a policy question when the union files a grievance alleging that a one-officer patrol car violates the general safety clause in the contract? Why should a public employer be forced to delegate its policy determination of a particular assignment to a grievance arbitrator, when it is not required to subject the broader policy decision of adopting a general rule to an impasse arbitration panel, or to negotiate about the subject to an impasse?³² PERB appears to be saying that *general* policy questions are not mandatory subjects, but *specific* policy questions are.

The rationale advanced by PERB has little to do with the question of *who* should make those policy decisions. It has, rather, to do with the question of the *context* in which the decision will be made. Apparently, a general policy decision should not, in PERB's opinion, be made in the context of negotiations, but rather should be made in the context of an arbitration hearing where it will be resolved in a particular case based on particular facts.³³

This may involve a judgment by PERB, not quite clearly articulated in its decisions, that policy questions involving the man-

32. Or, viewed from the union's perspective, why should the union be precluded from arguing in negotiations that *all* foot patrols should be manned by at least two officers, if the union has the safety data to support its demand? Why must the union have to fight that battle in an individual arbitration over every assignment?

33. Query, in this regard, whether the enforcers of SOSHA, the new New York public sector health and safety law, will defer to arbitration decisions involving health and safety issues decided under a "general duty" style contract provision. The Federal Occupational Safety and Health Administration [hereinafter cited as OSHA] has adopted a regulation providing for such deferral on a basis similar to that embraced by the NLRB, but only in cases involving employee allegations of discrimination based on protected health and safety activities. 29 C.F.R. § 1977.18 (1981). Under this regulation, the agency will postpone processing an employee complaint where the employee is simultaneously pursuing substantially the same complaint under a contractual grievance procedure. The arbitrator's award will merit deferral if OSHA determines that there was an adequate determination of the factual issues, the proceedings were procedurally fair, and the result was not "repugnant to the purpose and policy of the Act." 29 C.F.R. § 1977.18(c) (1981). See, e.g., *Brennan v. Alan Wood Steel Co.*, 3 O.S.H. Cas. (BNA) 1654 (E.D. Pa. 1975). However, this regulation is probably not considered a "safety and health standard" of the type intended in section 27-a(4) of SOSHA, see *supra* note 6. See, e.g., *Louisiana Chemical Ass'n v. Bingham*, 657 F.2d 777 (5th Cir. 1981) (discussion of "standards" as distinguished from "regulations"). The regulation thus will not necessarily be adopted by the Industrial Commissioner as a SOSHA regulation. (Indeed, it was not so adopted when the Commissioner made his first attempt to adopt federal regulations under SOSHA. See *infra* note 84.) Furthermore, there is no statutory or regulatory deferral mechanism under OSHA with respect to arbitration over issues *other than* employee discrimination.

ner and means of providing public services may be based on an objective consideration of the merits by an impartial neutral (the arbitrator), but may not be based on the relative negotiating strengths of the parties. However, this is not really a judgment that a subject is or is not mandatory; it is, rather, a judgment as to how the mandatory subject is to be dealt with, inasmuch as grievance arbitration is really just a different part of the collective negotiation process.³⁴

Thus, it appears that the initial distinction drawn by PERB prior to the 1976 *White Plains P.B.A.* case may have been more nearly correct than PERB's more recent doctrine with respect to staffing. The relationship of overall staffing of an agency or a department to safety considerations may be very real, but it is somewhat attenuated. However, a staffing demand with respect to a particular piece of equipment or a particular potentially dangerous work assignment so clearly relates to the terms and conditions of employment of the employees that to hold it non-mandatory (yet potentially subject to arbitration) appears to be a serious misapplication of the entire concept of mandatory subjects of bargaining.

B. *Hazardous Duty Pay*

Police and firefighter unions have frequently demanded some form of "hazardous duty pay," couched as a health and safety issue. These proposals normally specify particular "hazardous" conditions or circumstances under which premium pay is to be given to the employee. PERB has upheld the right of public sector unions to negotiate for such pay on the theory that it is merely an element of wages, as against the arguments of employers that such pay is really a penalty designed to coerce management in the exercise of its exclusive prerogatives. In a recent case, *Village of Spring Valley P.B.A.*,³⁵ PERB commented:

The proposition of law advanced by the Village is that a demand is improper

34. PERB has recognized this very problem, albeit in puzzling and inconsistent ways, in its decisions with respect to the status of negotiation demands for clauses dealing with arbitration or other joint determinations of safety-related issues. In some of those cases, see *infra* notes 42-50 & accompanying text, PERB has stated that such a demand is not a mandatory subject if it could be interpreted to require submission to arbitration of non-mandatory subjects. In other cases, however, PERB has let pass some proposals which could require submission of "non-mandatory" topics to arbitration.

35. *Village of Spring Valley P.B.A.*, 14 P.E.R.B. ¶ 3010 (1981).

if it sets up a system of penalties primarily designed to prohibit the public employer from exercising its statutory responsibilities even if, on its face, the demand is for premium pay.

This proposition of law is correct, but there is no evidence in the record that makes it applicable here. All premium pay provisions impose some costs upon an employer and thus discourage some conduct. It does not follow, however, that these provisions constitute penalties. For a premium pay provision to be deemed a penalty, it must be shown that the provision bears no reasonable relationship to a particular hazard or to other circumstances affecting working conditions which it is designed to compensate. There is no such showing in the record before us.³⁶

Thus, so long as the premium pay demand has some "reasonable relationship" to a hazardous working condition, PERB will find the demand to be a mandatory subject of bargaining. In the *Spring Valley* case, the police union demanded a pay premium of \$90 a shift to be divided among all officers on the shift if the total number assigned to the shift fell below six. The union also demanded an extra \$5 per shift for any officer not provided with a working portable radio on patrol, or who was assigned to use a patrol car not equipped with power windows. PERB held all these demands to be mandatory subjects of bargaining, even though the underlying demands (*i.e.*, selection of equipment) would clearly not have been considered mandatory by PERB.

In *Haverstraw P.B.A.*,³⁷ the police union produced an interesting and wide-ranging set of hazardous duty pay demands, all upheld by PERB as mandatory subjects, including extra pay under the following circumstances:

- 1) where the town failed to provide firearms training in the amount of at least 100 rounds per month;
- 2) where more than three years passed between high speed driver training sessions;
- 3) for assignments of patrol without the use of blackjacks;
- 4) for every day of patrol while the department forbids the use of 0.327 calibre ammunition;
- 5) for operating a patrol car without snow tires; and
- 6) for assignments of patrol when nightsticks or mace are prohibited.

Each of these demands relates to a substantive demand that would

36. *Id.* at 3017 (footnote omitted).

37. 11 P.E.R.B. ¶ 3109 (1978), *aff'd*, *Town of Haverstraw v. Newman*, 75 A.D.2d 874, 427 N.Y.S.2d 880 (2d Dep't 1980).

most likely be held by PERB to be a non-mandatory subject, judging by PERB's rulings on similar substantive demands.³⁸ In each case, the union, by structuring its demand in terms of premium pay, has managed to circumvent PERB's policy against requiring bargaining with respect to the underlying "policy" issue.

In *Firefighters Union Local 189 (City of Newburgh)*,³⁹ PERB dealt with a hazardous duty pay demand from firefighters phrased entirely in terms of staffing, providing for a pay premium whenever staffing fell below certain levels. PERB held that this sort of demand was analogous to a workload limitation demand by a teachers' union. While a teachers' union may not compel negotiations on the subject of class size, it can demand to negotiate on workload, which is a consequence of, *inter alia*, class size. Similarly, while a firefighters union cannot compel direct negotiations on staffing, it can demand negotiation for premium pay linked to staffing levels, because workload is a function of staffing.

Under the PERB decisions, hazardous duty pay is a mechanism which public sector unions can use to compel bargaining indirectly about the very subjects that PERB has said are not mandatory subjects for negotiation. As such, it is clear that the PERB decisions casting such subjects into the purgatory of the non-mandatory sphere are of little real effect.

Premium pay in a time of fiscal restraint may not be a plausible alternative for a public sector employer. In cases where the premium pay relates to policy questions which are not primarily economic in character, such as the carrying of blackjacks by police officers, the employer may have no alternative but to adopt the policy decision underlying the union's request. Hazardous duty pay thus creates a legal loophole through which the public sector unions in the "risky" professions can lead their troops into the heart of what PERB has deemed to be the managerial prerogatives of public employers. This raises a question whether PERB has correctly classified policy decisions of somewhat lesser significance as non-mandatory, a question illuminated by New York Court of Appeals decisions on enforceability of arbitral awards.⁴⁰ Rather than forcing the public sector unions to resort to the subterfuge of "haz-

38. See *infra* text accompanying note 64.

39. 11 P.E.R.B. ¶ 3087 (1978).

40. See *supra* note 22.

ardous duty pay," might not PERB better evaluate the significance of the policy prerogatives it purportedly seeks to preserve when it classifies such relatively minor questions as providing grill lights on police cars as non-mandatory?⁴¹

C. Safety Committees

As noted above, PERB and the courts have frequently recommended that joint safety committees be established to deal with safety disputes. Public employers have continued to challenge the mandatory nature of such demands, however, on the basis that the proposed provision would give the safety committee too broad a jurisdiction. In *Fairview Firefighters Local 1586*,⁴² PERB held non-mandatory (and thus not subject to compulsory "interest arbitration") a demand for the establishment of a joint safety committee which would "cover all matters relating to the health and safety of the bargaining unit as prescribed and set forth by this Public Arbitration Panel."⁴³ In PERB's view, this demand was non-mandatory because it did not specify the lawful jurisdiction of such a joint committee, and such a subject could not be left to the Arbitration Panel to determine as part of the compulsory "interest arbitration" process because the Panel might produce an arbitration clause with too wide a scope.

Surprisingly, however, PERB has found proposals for joint safety committees which included a more detailed description of their jurisdiction, potentially covering non-mandatory subjects, to be mandatory. Thus, in *Firefighters Union Local 189 (City of Newburgh)*,⁴⁴ PERB approved the following proposal as a mandatory bargaining subject:

The Committee's jurisdiction shall cover all matters of safety and health to the members of the Fire Department, including but not limited to, the total number of employees reporting to a fire and the minimum number of employees to be assigned to each piece of firefighting apparatus. The foregoing is intended to be illustrative and not all inclusive . . . In the event of a deadlock between Firefighters and City representatives, the issue in dispute shall be submitted to binding arbitration⁴⁵

41. See, e.g., *Police Ass'n of New Rochelle*, 10 P.E.R.B. ¶ 3042 (1977).

42. 12 P.E.R.B. ¶ 3083 (1979).

43. *Id.* at 3158 (emphasis supplied to the statement of the union's demand by PERB).

44. 11 P.E.R.B. ¶ 3087 (1978).

45. *Id.* at 3144. Interestingly, PERB had no comment on the phrase "members of the

Clearly, this proposal contemplates subjecting inherently managerial decisions (as found by PERB in its staffing cases) to binding arbitration. PERB has held that staffing *per se* is a non-mandatory subject; how can PERB reconcile its finding that no duty to bargain over staffing exists, with its recognition of a duty to bargain over a proposal that staffing be made subject to compulsory grievance arbitration? PERB's explanation of its decision in the *Newburgh* case is no explanation at all:

The City argues that the language of the demand here is too broad and might permit the safety committee to set general minimum manning requirements under the guise of a purported safety claim. *Although we agree that the language of the demand might be improved upon, we do not find it defective.* . . . [I]n its brief to us here, [the firefighters' union] argues that its demand is not intended to set general manning standards. Nevertheless, if the demand is ultimately accepted or imposed, the parties, through negotiations, or the arbitrator appointed pursuant to § 209.4 of the Taylor Law, would do well to clarify the language with this concern in mind.⁴⁶

Why should the impasse panel be trusted to limit the scope of jurisdiction of the joint committee in *Newburgh* but not trusted to do the same in *Fairview*? In short, PERB seems to be implying that a non-mandatory subject can in effect be made mandatory by embodying it in an otherwise mandatory grievance resolution procedure. Even if the interest arbitrator takes into account the non-mandatory nature of the underlying demand, this decision vitiates the whole concept of inherently managerial concerns being non-bargainable. Indeed, it is hard to see any real distinction in this regard between the proposal in this case and the one disapproved by PERB in *Fairview*. In both instances, the proposal could leave significant questions concerning jurisdiction of the safety committee to be resolved by an interest arbitrator. Yet PERB approves doing so where the provision tells the arbitrator to include non-mandatory subjects in his jurisdiction, but disapproves doing so where there is no such instruction to the arbitrator. Surely this is a basic inconsistency in PERB's position.

Fire Department." In a recent decision, *Oneida P.B.A.*, 15 P.E.R.B. ¶ 4530 (1982), a PERB Hearing Officer held non-mandatory a similar safety committee proposal because it purported to cover "members of the police department" without excluding non-bargaining unit police employees. *Id.* at 4568. PERB has held that unions may not make demands with respect to employment conditions of non-unit employees. *Somers Faculty Ass'n*, 9 P.E.R.B. ¶ 3014 (1976).

46. 11 P.E.R.B. ¶ 3087, at 3144 (emphasis supplied, footnote omitted).

In some cases, unions have proposed that the public employer recognize a union safety committee as having some particular standing or authority, even though it does not include employer representatives. PERB has rejected as non-mandatory several different variations of this approach, on the grounds that it really constitutes a demand that the employer delegate policymaking decisions to the union.⁴⁷

For example, in *Troy Uniformed Firefighters Local 2304*,⁴⁸ the union proposed that its own safety committee be entitled to order removed from service equipment which it judged to be unsafe. PERB rejected this proposal out-of-hand, stating that it would entirely remove a managerial prerogative from the control of the employer. In *City of Kingston*,⁴⁹ the union proposed that its own safety committee be authorized to "certify" to the Fire Chief that particular equipment was unsafe. PERB rejected this proposal as well, contending that the proposal did not make clear what the effect of certification was to be. Implicit in the proposal was the assumption that once it was certified as unsafe by the union, a piece of equipment would not be used by the employees. As in the *Troy Firefighters* case, PERB would not require an employer to bargain over a proposal to remove from the employer's control decisions about what equipment to use. Of course, under a general safety clause, a union could file a grievance over the safety of particular equipment; in that instance, a neutral arbitrator would decide whether the equipment was unsafe, not a one-sided union committee.

Under existing PERB decisions, the issue of scope of jurisdiction of joint safety committees is poorly defined. PERB has stated that an employer may be required to negotiate only about mandatory subjects, but this would appear to exclude the sorts of staffing questions (like number of officers on a police assignment) which PERB has apparently approved leaving to the committee process for resolution. This is clearly an area where a "definitive

47. The NLRB has apparently taken a contrary position with respect to the private sector. See, e.g., *Carbonex Coal Co.*, 248 N.L.R.B. 779 (1980) (union may demand negotiation over proposal to create employee-operated safety committee authorized to order unilateral shutdown of mine on safety grounds).

48. 10 P.E.R.B. ¶ 3015 (1977).

49. 9 P.E.R.B. ¶ 3069 (1976).

ruling" from PERB is sorely needed.⁵⁰

D. *Non-Mandatory Health or Safety Related Subjects*

PERB has held to be non-mandatory many types of demands which have a conceptual relationship to the area of employee health and safety. Most of these non-mandatory subjects were demands for particular types of safety equipment. PERB's rationale has been that the selection and deployment of equipment to be used is a management prerogative.⁵¹ However, as noted above in connection with hazardous duty pay, a union may compel negotiation about premium pay in the event that the employer fails to use

50. Various other bargaining demands related to health and safety have been designated as mandatory subjects of bargaining by PERB. A demand that all police patrol cars be equipped with air conditioning has been held to be mandatory in several different cases, on the grounds that the subject relates primarily to the health and comfort of the employees. Teamsters Local 294 (City of Amsterdam), 10 P.E.R.B. ¶ 3007 (1977); Police Ass'n of City of New Rochelle, 10 P.E.R.B. ¶ 3042 (1977); Scarsdale P.B.A., 8 P.E.R.B. ¶ 3075 (1975). Similarly, under the rubric of "personal comfort, convenience and safety," PERB has held mandatory a demand that police officers "in adjoining sectors or in the same radio motor patrol car" be allowed to take meal breaks together, provided that the desk officer "reasonably" approve and adequate personnel remain on duty. P.B.A. of Nassau County, 14 P.E.R.B. ¶ 4557, at 4627 (1981). A demand that the employer be required to pay for annual physical examinations for employees was held to be mandatory in Onondaga-Madison BOCES, 13 P.E.R.B. ¶ 3015 (1980), *aff'd*, 82 A.D.2d 691, 444 N.Y.S.2d 226 (3d Dep't 1981). A related demand, that the employer be required to provide a physical fitness program for employees, was held to be mandatory in Police Association of New Rochelle, 13 P.E.R.B. ¶ 3082 (1980). In the same case, PERB also found to be mandatory a demand that the employer establish a Medical Review Board, which would determine whether illnesses or injuries of unit employees were job-related. In Somers Faculty Association, 9 P.E.R.B. ¶ 3014 (1976), PERB held mandatory a teachers' union proposal to establish procedures for safeguarding teachers from disruptive or violent students. PERB has held to be mandatory a demand that no employee be required to operate a vehicle which has been found to be unsafe. Scarsdale P.B.A., 8 P.E.R.B. ¶ 3075 (1975); P.B.A. of White Plains, 12 P.E.R.B. ¶ 3046 (1979). However, in the two preceding cases, PERB refused to require bargaining over a demand that any vehicle shown to have a mechanical or safety defect must be taken out of service. PERB's reasoning was that the employer might decide that the vehicle, while unsafe for use by a policeman on patrol, was usable in other functions. Consequently, the demand was too far-ranging in its scope to constitute a mandatory subject of bargaining, because it would unduly curtail the prerogative of management to decide how to use its equipment in providing services to the public. In City of Lackawanna, 15 P.E.R.B. ¶ 4522 (1982), PERB held that the City violated its mandatory bargaining duty by unilaterally terminating free parking arrangements, where alternative parking arrangements offered by the City were objectionable on safety grounds.

51. With respect to the private sector, the NLRB has held that the selection of particular safety equipment to be used by employees is a mandatory subject for bargaining. J.P. Stevens & Co., Inc., 239 N.L.R.B. 738 (1978), *modified on other grounds*, J.P. Stevens & Co., Inc. v. N.L.R.B., 623 F.2d 322 (4th Cir. 1980).

particular equipment which the union deems necessary for safety reasons. And, as noted in the discussion of staffing, unions may be able to compel arbitration over disputes with respect to the subjects of these demands if their contracts include general safety clauses, by alleging violations of the safety clauses in particular situations.

Examples of non-mandatory demands include the following: bullet-proof vests and shotguns for policemen;⁵² grill lights on police cars;⁵³ provision of firearms for bridge and tunnel officers;⁵⁴ annual handgun training for all officers;⁵⁵ contractual specifications of minimum number of vehicles to patrol on a shift;⁵⁶ number of police to be assigned per patrol car;⁵⁷ contractual requirement to fill all vacancies within a specified period of time;⁵⁸ contractual adoption, by reference, of the National Fire Protection Association Manual as a safety standard for performance of unit work;⁵⁹ proposal to relieve employees of responsibility for maintaining safety of equipment and apparatus where the employee feels he is not able to effect necessary repairs;⁶⁰ restrictions on requiring police officers to handle dead bodies which have decomposed to the point of of-

52. Police Ass'n of New Rochelle, 13 P.E.R.B. ¶ 4540 (1980) (bullet-proof vests). PERB considered this to be a demand with "safety implications," but one essentially relating to the manner and means of rendering public service. 13 P.E.R.B. ¶ 4540, at 4582. Police Ass'n of New Rochelle, 10 P.E.R.B. ¶ 3042 (1977) (shotguns for police vehicles). PERB held that "selection of weapons and their tactical deployment" was a managerial prerogative. 10 P.E.R.B. ¶ 3042 at 3079, citing *In re City of Albany*, 7 P.E.R.B. ¶ 3078 (1974).

53. Police Ass'n of New Rochelle, 10 P.E.R.B. ¶ 3042 (1977) (grill lights). PERB considered this topic difficult, since it dealt with both safety and manner of providing service. However, PERB decided that manner of service predominated.

54. Bridge and Tunnel Officers Benevolent Ass'n, Inc., 12 P.E.R.B. ¶ 4614 (1979) (selection and deployment of weapons).

55. P.B.A. of Nassau County, 14 P.E.R.B. ¶ 4557 (1981). Training is held by PERB to be a decision about "extent and quality of service." *Id.* at 4630.

56. White Plains P.B.A., 9 P.E.R.B. ¶ 3007 (1976).

57. *Id.*

58. Scarsdale P.B.A., 8 P.E.R.B. ¶ 3075 (1975). PERB held that this was really a demand aimed at restricting staff reductions, and that staff reductions are a managerial decision. *Id.* at 3133.

59. Rochester Firefighters Local 1071, 12 P.E.R.B. ¶ 3047 (1979). PERB objected to a demand to incorporate by reference an external set of documents which was "voluminous" and which covered "many matters that are not terms and conditions of employment." *Id.* at 3086-87.

60. Fairview Firefighters, 12 P.E.R.B. ¶ 3083 (1979). PERB held that public employers have "exclusive discretion" to hold employees responsible for work assigned to them. *Id.* at 3157.

fensiveness, except in genuine emergencies;⁶¹ restrictions on scheduling police foot patrols late at night and restrictions on boating operations late at night;⁶² and restrictions on scheduling fire inspections when temperature is too high, too low, or precipitation is occurring.⁶³

In each of these cases, the union advanced an argument that the demand involved the health or safety of employees. While admitting in many instances that health and safety were affected by the equipment or practice in question, PERB determined that a contractual restriction of the type proposed would invade the management prerogatives of the public employer to determine what equipment it will use, or how and when it will fulfill its mission of providing service to the public.

As noted above, these holdings do not really preclude the unions from bargaining about these subjects. As "permissive" subjects, they can be bargained about if the public employer is willing to discuss them. Furthermore, each of them can be restructured as a mandatory bargaining issue in terms of "impact" or "hazardous duty pay."⁶⁴ As such, it seems that their designation by PERB as being non-mandatory does not exclude them totally from the scope of collective bargaining.

III. IMPACT OF RECENT SAFETY AND HEALTH LEGISLATION

With the recent passage of occupational safety and health laws and toxic substance laws to cover public sector employees in New York,⁶⁵ additional questions have arisen. To what extent can public sector unions require bargaining over the employer's *statutory* duties with respect to health and safety? More particularly, can a

61. P.B.A. of Nassau County, 14 P.E.R.B. ¶ 4557 (1981). PERB held that this demand would unlawfully restrict the employer's right "to assign a task inherently part of the police officer's function." *Id.* at 4630.

62. *Id.*

63. Rochester Firefighters Local 1071, 12 P.E.R.B. ¶ 3047 (1979); Fairview Firefighters, 12 P.E.R.B. ¶ 3083 (1979). See also Greenville Uniformed Firemen's Ass'n, Local 2093, 15 P.E.R.B. ¶ 4501, at 4511 (1981). Scheduling work is regarded by PERB to be a management prerogative.

64. In this regard, note the similarity of many of the subjects mentioned in this section to the hazardous duty pay demands upheld by PERB in the Haverstraw P.B.A. case, discussed *supra* in text accompanying note 37.

65. N.Y. PUB. HEALTH LAW, §§ 4800-08 (McKinney Supp. 1981-82), (enacted June 30, 1980); N.Y. LAB. LAW §§ 875-883 (McKinney Supp. 1981-82) (enacted June 26, 1980); N.Y. LAB. LAW § 27-a (McKinney Supp. 1981-82) (enacted June 30, 1980).

public sector union require an employer to bargain over a union demand to create a situation which might result in a health or safety hazard which is forbidden, either expressly or impliedly, by statute?⁶⁶

PERB has apparently not yet ruled on the above questions with respect to health and safety issues. However, its rulings generally on the subject of statutory obligations as opposed to bargaining demands are instructive. In this regard, PERB has embraced the following general formulation: "A demand relating to a subject which is treated by statute is negotiable so long as the statute does not clearly preempt the entire subject matter and the demand does not diminish or merely restate the statutory benefits."⁶⁷

As illustrative of this principle, in *City of Rochester*,⁶⁸ the union demanded a provision which would make arbitrable the City's refusal to pay bills for medical services performed for employees injured while on duty. The City argued that because the New York General Municipal Law covered the same general subject matter,⁶⁹ the statutory rights of employees and the public employer could not be made subject to contractual arbitration. PERB disagreed, asserting that the statute did not preempt the entire subject matter,⁷⁰ and that the proposal was in no way an attempt

66. This is not a frivolous question. In the private sector, a union demand that employees *not* be required to wear hardhats is a mandatory subject of bargaining, even though pertinent federal OSHA regulations may require wearing of hardhats on the job in question. See *Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Comm'n*, 534 F.2d 541 (3d Cir. 1976) [hereinafter cited as *Atlantic & Gulf Stevedores*] (refusal of union represented employees to wear hardhats in defiance of OSHA regulations subjects employer to liability under OSHA, even though NLRB has held that employer must bargain with union over hardhat requirement); *accord*, *I.T.O. Corp. of New England v. OSHRC*, 540 F.2d 543 (1st Cir. 1976). Furthermore, the NLRB has held that an employer's unilateral imposition of disciplinary rules with respect to violation of safety requirements by employees was an unfair labor practice. *Electri-Flex Co.*, 238 N.L.R.B. 713 (1978), *enforced*, 104 L.R.R.M. 2612 (7th Cir. 1979) (suspension imposed for repeated failure to wear safety glasses). In *Atlantic & Gulf Stevedores*, the Third Circuit also recognized that the employer could not unilaterally impose disciplinary rules with respect to refusal to wear hardhats, when it noted that such rules would be a subject for collective bargaining. 534 F.2d at 555.

67. *City of Rochester*, 12 P.E.R.B. ¶ 3010, at 3017 (1979).

68. *Id.*

69. Although no particular provision of that law was mentioned in PERB's opinion, N.Y. GEN. MUN. LAW, § 92-a (McKinney 1977) appears to be the provision the City relied upon in making the argument.

70. Indeed, the statutory provision in question merely authorizes municipalities to expend funds for the purpose of providing medical coverage for their employees, without specifying how disputes over payment of bills are to be settled.

to diminish or restate statutory rights, but rather was an attempt to introduce an additional mechanism for the enforcement of those rights. PERB added that it was aware of no public policy against leaving enforcement of statutory rights to a contractual arbitration process. Consequently, the demand was a mandatory subject of bargaining.

In the same case, the union also demanded a provision dealing with standards for granting maternity leave. The proposed standards would be different from those governing other sorts of medical leaves. PERB held that this was *not* a mandatory subject of bargaining, because the public policy of the state, as announced by the court of appeals, was that pregnancy and childbirth were not to be treated differently from other disabilities for purposes of leave.⁷¹ Consequently, adoption of any proposal that would treat pregnancy differently would violate the state's Human Rights Law.⁷² The public employer, said PERB, could not be compelled to negotiate about a proposal which, if implemented, would clearly violate the law.⁷³

Presumably, if a public sector union were to demand a contractual provision which would clearly violate a specific safety standard under the public sector occupational safety and health laws of New York, the demand would constitute an illegal, and thus neither mandatory nor permissive, subject of bargaining for the reasons articulated by PERB in *City of Rochester*. That is, a public employer should not be compelled to negotiate about a proposal which, if implemented, would clearly constitute a violation of law, even though the proposal relates to a term or condition of employment.⁷⁴

A PERB decision which issued just months before the effective date of the New York State Occupational Safety & Health

71. *Union Free School Dist. No. 6 v. Human Rights Appeals Bd.*, 35 N.Y.2d 371, 320 N.E.2d 859, 362 N.Y.S.2d 139 (1974).

72. N.Y. EXEC. LAW, Art. 15, which prohibits, *inter alia*, discrimination in terms and conditions of employment on account of sex.

73. *City of Rochester*, 12 P.E.R.B. ¶ 3010.

74. That the NLRB has apparently rejected this approach in the safety area, as exemplified by the hardhat problem in *Atlantic & Gulf Stevedores*, does not necessarily mean that PERB must follow suit. Indeed, there is a certain horrible fascination to the idea that one public agency (PERB) may be placed in the position of requiring another public agency (the public employer) to negotiate over a demand that it violate a law administered by yet another public agency (the N.Y. State Department of Labor).

Law (SOSHA) may point to an area where this principle will be tested. In *Steuben-Allegheny BOCES*,⁷⁵ PERB ruled that an employer's unilateral decision to restrict smoking to certain areas of its building was a mandatory subject of bargaining. No health argument was explicitly made in that case, to judge by the official report; rather, certain non-smokers who were not unit employees had requested the employer to designate a non-smoking area so that they would not have to work in the midst of tobacco fumes and smoke emitted by members of the bargaining unit. The employer unilaterally announced that henceforth all smoking would be restricted to the kitchen and the conference room, which were the rooms considered by the employer to have the best ventilation in the building. Employees were restricted to smoking when they could take breaks from their work and go to one of those rooms. Thus, the issue was framed in terms of accommodating the preferences of certain employees for a smoke-free environment. PERB held that management's interest in controlling the working environment and satisfying the interests of non-unit employees did not clearly outweigh the interests of unit employees in their working conditions. Consequently, the employer was ordered by PERB to rescind its smoking policy and negotiate with the union if it wanted to institute such a policy in the future.⁷⁶

With the enactment of SOSHA there is now a statutory policy requiring public employers to provide safe and healthy workplaces.⁷⁷ Thus, there will be new arguments for PERB to factor into the equation. In line with the general policy on statutory issues quoted above, PERB may well hold that the question of smoking rules has become a non-mandatory subject, because any demand to allow smoking could result in a diminishing of the statutory rights of all employees (regardless of their bargaining unit status) to a healthy workplace, and thus cause a violation of the

75. 13 P.E.R.B. ¶ 3096 (1980).

76. *Id.* at 3153. Compare *Smith v. Western Electric Co.*, 51 U.S.L.W. 2200 (Mo. Ct. App., E.D. 9/14/82) (employer must provide smoke-free environment if required by non-smoking employee).

77. N.Y. LAB. LAW § 27-a(3)(a)(1) (McKinney 1981-82):

Every employer shall furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to lives, safety or health of its employees.

public employer's statutory duty.⁷⁸

PERB will also have to deal with the question whether SOSHA and the Toxic Substances Law have "preempted the field" to exclude bargaining over occupational safety and health issues in whole or in part.⁷⁹ The new state laws do not expressly speak to the issue of preemption, but various provisions, such as those giving the Industrial Commissioner *exclusive* authority to enforce safety standards,⁸⁰ might be read to have preemptive force with respect to questions of compliance with state safety standards. On the other hand, the new laws incorporate many references to "employee representatives," perhaps signalling an expectation by the legislators that labor organizations will have a significant role to play under these laws in representing the safety and health interests of employees.⁸¹

78. In *Johns-Manville Sales v. International Ass'n of Machinists*, 621 F.2d 756 (5th Cir. 1980), a private sector case, the employer unilaterally promulgated a no-smoking rule (with a discharge penalty for repeat offenders) in an asbestos products plant, citing as justification that only smokers were at special health risk in the plant. The employer argued that its general duty under OSHA to provide a safe working place compelled the new work rule. The union grieved promulgation of the rule and won the ensuing arbitration case. The federal court refused to vacate the arbitrator's award, holding that OSHA could, if it wished, forbid smoking in the plant, but that the employer, bound by his collective agreement, had to abide by the arbitrator's award in the absence of any *specific* OSHA regulation against smoking in asbestos plants. Thus, the "general duty" policy under safety and health laws would, in the federal court's opinion, not relieve an employer from its duty to bargain over new safety rules, unless a specific OSHA regulation compelled adoption of a particular rule. (Note the contrast with the court holding in *Atlantic & Gulf Stevedores*, *supra* note 66, where even a specific OSHA regulation requiring wearing of hardhats was held not to relieve the employer from its duty to bargain with the union over the right to discipline employees for refusing to wear hardhats.)

79. The NLRB has never accepted the argument that statutory safety requirements relieve an employer from a duty to bargain over safety issues. In *Gulf Power Co.* the Board commented:

Such laws, like the minimum wage and a variety of governmental regulations, merely establish certain minimum requirements in their respective fields as conditions of doing business and are not intended to preempt their fields of regulation to such an extent as to exclude therefrom the concept of collective bargaining.

150 N.L.R.B. 622, 626 (1967). In *J.P. Stevens & Co., Inc.*, 239 N.L.R.B. 738 (1978), the NLRB held that an employer was not free unilaterally to select safety equipment required to comply with a citation from OSHA; the employer was required to bargain with the union over such a selection, because the introduction of new equipment would change employment conditions of unit employees.

80. N.Y. LAB. LAW § 27-a(2) and (6) (McKinney 1981-82).

81. See, e.g., Toxic Substances Law, §§ 876, 879, 880; SOSHA, §§ 27-a(1)(c), 27-a(5), 27-a(6)(c), 27-a(7)(c), 27-a(9)(c), 27-a(10). In essence, the "employee representative" is given

It seems most likely that PERB will occupy a middle ground on the question of preemption, similar to that expressed by the NLRB and the federal courts in the private sector. The public sector unions could reasonably argue that particular SOSHA standards should be seen as minimum standards. So long as the union's demand is not for a less safe standard, it would not be inconsistent with the scope and purpose of the safety laws to require bargaining over demands for more stringent safety requirements.⁸² Similarly, a demand for creation of a joint safety committee to take up safety issues does not appear inconsistent with the statutory enforcement authority of the Industrial Commissioner.⁸³

Consequently, PERB will be required to engage in a very subtle and difficult line-drawing exercise in accommodating the various statutory imperatives involved. Because the range of mandatory subjects available to public sector unions is at least theoretically narrower than that available to their private sector counterparts, due to the restriction against bargaining over the "manner and means" of providing public services, the unions can be expected strenuously to resist conceding any negotiation rights in the health and safety area. However, public employers who are faced for the first time with compliance demands under voluminous health and safety regulations⁸⁴ are likely to be eager to avoid

access to records and information, the right to participate in initiating and carrying out inspections, and various procedural rights with respect to SOSHA proceedings. Employee representatives are also authorized to sue for injunctive relief with respect to safety violations under certain circumstances. It is noteworthy in this regard that public sector unions were active proponents of the new health and safety laws when they were pending in the state legislature.

82. Under this theory, PERB would certainly have to reassess its rationale in *Steuben-Allegheny BOCES*, 13 P.E.R.B. ¶ 3096 (1981) (unilateral promulgation of smoking rules), if a similar case were to arise and a health argument were raised.

83. However, it would probably be unlawful for the employer to demand that the joint safety committee procedure preclude employees or the union from directly pursuing their rights under the state's Toxic Substances Law § 880. Section 880 provides a mechanism for employees or their representatives to obtain information regarding toxic substances used in the workplace, and also for the filing of charges against employers with the Industrial Commissioner. An employer request that employees waive these rights constitutes "an act of discrimination" under the statute. *Id.* at § 880(7).

84. Section 27-a(4)(a) directs the Industrial Commissioner to adopt by rule-making and apply to all public employees in the state "all safety and health standards promulgated under the United States Occupational Safety & Health Act of 1970 (Public Law, 91-596) which are in effect on the effective date of this section. . . ." While the Commissioner's first attempt to comply with this section has been held defective due to failure to comply with state constitutional rule-making requirements, New York State Coalition of Public Employ-

the complications of negotiating about the extent of their statutory health and safety duties. Consequently, it is likely that the scope of negotiations on safety and health issues will continue to be sharply contested by the parties.

CONCLUSION

The issues of safety and health bring into sharp focus the basic dilemma of public sector collective bargaining, involving as they do public policies which are frequently at apparent cross-purposes. On the one hand, there is the strong policy that decisions about the manner and method of providing public services be made by officials accountable to the public. On the other, there is the more recent but equally strongly expressed policy of allowing public employees to engage in collective negotiations over their terms and conditions of employment, which certainly include many issues of safety and health. The reconciliation of these policy conflicts by PERB is now complicated further by the imposition of new statutory health and safety duties upon public sector employers, under which a large body of private sector regulatory material developed piecemeal over many years by federal agencies will be applied *en masse* to the public sector.

Under these circumstances, it is essential that PERB develop a policy with respect to safety and health issues that takes into account the responsibilities of public employers under SOSHA. In this regard, PERB should avoid creating the sort of situation illustrated by the *Atlantic Stevedores* case, *i.e.*, obligating employers to bargain with unions about demands by the unions to violate safety regulations. Union demands that would require a public employer to negotiate about the decrease of compliance (or lack of compliance) with safety and health regulations should be treated as illegal subjects which unions may not raise at the bargaining table. Inasmuch as the unions have rights under SOSHA to invoke the State Department of Labor processes if an employer fails to comply with SOSHA standards and regulations, there is no need to subject demands over compliance with SOSHA requirements to

ers v. New York State Dep't of Labor, 110 Misc. 2d 215, 441 N.Y.S.2d 878 (Sup. Ct., Albany County 1981), upon proper promulgation, the public employers of New York will be subject to the requirements of about 950 pages of substantive safety and health standards found in 29 C.F.R. §§ 1910 and 1926.

the bargaining process.

To the extent that a union is demanding a *safer* workplace than would be required by SOSHA regulations, different considerations come into play. The NLRB policy enunciated in *Gulf Power Co.*⁸⁵ appears eminently reasonable in this regard, to the extent that it can be accommodated with the conflicting public policy questions implicated in the basic health and safety dilemma. Consequently, viewing the matter abstractly, it follows that a demand for more stringent safety practices should be considered a mandatory subject for bargaining.

Finally, however, there remains the most fundamental question: where should PERB draw the line with respect to the basic dilemma? As noted above, the "line," to the extent it exists, appears to waver, being in some areas indecisive, and in others of almost no effect. For example, PERB must recognize "hazardous duty pay" for what it is—an indirect way for public sector unions to demand bargaining over issues which PERB has ruled to be non-mandatory as a matter of public policy. As such, the subterfuge of hazardous duty pay should not be allowed to continue, because it undermines the integrity of the very policy PERB purports to be applying when it labels a particular safety demand non-mandatory. At the same time, PERB should take a serious look at the subjects it has declared non-mandatory and consider, realistically, whether important issues of policy determination by responsible public officials are *really* implicated in demands such as providing bullet-proof vests or grill lights on police cars. While there are certainly some demands couched in safety terms (such as arming bridge and tunnel officers)⁸⁶ that carry broad public policy implications and probably should not be subject to mandatory bargaining, the list of such subjects may well be smaller than PERB has thus far indicated.

PERB should also devote some attention to the scope of safety committee jurisdiction. A joint safety committee is of course merely a mechanism for bargaining over safety issues during the term of a collective bargaining agreement. Consequently, if a particular safety proposal is not a mandatory subject of bargaining at contract negotiation time, it should logically not be considered a

85. 156 N.L.R.B. 622, *enforced*, 384 F.2d 822 (5th Cir. 1967).

86. Bridge & Tunnel Officers Benevolent Ass'n, Inc., 12 P.E.R.B. ¶ 4614 (1979).

proper subject for consideration by a joint safety committee, and certainly not a subject for mandatory grievance arbitration. PERB should not follow the easier path by telling the parties that important safety questions can be dealt with on a case-by-case basis through a joint committee mechanism, but need not be dealt with as part of contract negotiations. This is merely deferring the question, not settling it.

As to the basic determination of whether a particular proposal is mandatory, PERB should be giving careful study to the question whether important issues of policy with respect to public services are truly implicated in a particular demand. To a certain extent, *every* demand which increases the cost of public services or affects how they are performed can be said to involve the making of public policy. However, if public sector labor relations is to be a meaningful process, this public policy argument should not be used to "bootstrap" on issues where the demand clearly relates to a basic term or condition of employment. In this regard, the public policy requiring bargaining on "terms and conditions of employment" is clear, unequivocal and express.⁸⁷ Indeed, the New York Court of Appeals, in defining the scope of mandatory issues, has emphasized that *all* terms and conditions of employment are negotiable unless the object of the demand "is a basic element of . . . policy bearing on the extent and quality of the service rendered."⁸⁸ Under this formulation, PERB should not hold a particular demand to be non-mandatory unless its object is clearly basic or fundamental to a determination of quality of service rendered to the public. Under such a test, few subjects should be ruled out, because many demands, while having greater or lesser bearing on such policy considerations, can hardly be considered fundamental or basic.

In the end, PERB must still deal with safety questions on a case-by-case basis. However, by taking care to articulate the theory behind its decisions and to eschew the inconsistencies of the past, PERB may avoid complicating the task of public employers faced with new statutory duties in the field of employee safety and health.

87. N.Y. CIV. SERV. LAW § 214(1) (McKinney 1973).

88. *West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d at 51, 315 N.E.2d at 777, 358 N.Y.S.2d at 723.