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COLLECTIVE BARGAINING AND THE FISCAL CRISIS IN NEW YORK CITY: COOPERATION FOR SURVIVAL

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I. Introduction

In 1975, New York City was on the verge of bankruptcy. The city's fiscal crisis was blamed in part on the collective bargaining process and there was a real question as to whether the process would survive. In an extraordinary rescue effort, the state and federal governments joined with the city administration, municipal labor unions, and the business community to "save" the city.

The state legislature created the Municipal Assistance Corporation¹ to market city securities and passed the Financial Emergency Act of 1975² which imposed a wage freeze on public employees. In 1978, Congress enacted the New York City Loan Guarantee Act,³ providing federal loan guarantees to the city. This legislation engendered increased state and federal government involvement in the city's affairs by mandating that state and federal agencies monitor collective bargaining between the city and its employees.⁴ The city's financial predicament also required increased cooperation in the public sector

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1. N.Y. PUB. AUTH. LAW § 3033 (McKinney 1981).

2. Ch. 868, [1975] N.Y. Laws 1405 (McKinney). See notes 6-23 *infra* and accompanying text.

3. 31 U.S.C. §§ 1521-1531 (Supp. III 1979). See notes 46-49 *infra* and accompanying text.

4. Committee on Labor and Employment Law, *The Impact of the Fiscal Crisis and State and Federal Remedial Legislation on the Structure and Scope of Collective Bargaining in New York City*, 34 RECORD OF N.Y.C.B.A. 754, 763 (1979) [hereinafter cited as *Committee Report*]. This article is the last of a series of three on the subject of the fiscal crisis and collective bargaining in New York City. The first two articles appear at 31 RECORD OF N.Y.C.B.A. 386 (1976), and at 32 RECORD OF N.Y.C.B.A. 462 (1977), respectively. The presence of state and federal agencies in the city's bargaining process has raised certain questions about who the real employer is. See Weitzman, *The Effect of Economic Restraints on Public-Sector Collective Bargaining: The Lessons of New York City*, 2 EMPL. REL. L.J. 286, 291, 293 (1977).

between labor and management. The survival of the city as well as the collective bargaining process necessitated compromise and conciliation and an abandonment of the traditionally adversarial relationship between the city and the unions. For example, the unions agreed to wage increase deferrals and accepted new cost saving programs for increasing productivity and the efficient delivery of public services. Most significantly, the unions agreed to commit employee pension fund contributions to the purchase of Municipal Assistance Corporation securities when no one else would buy the city's bonds.⁵ In exchange, the city agreed to give labor a share in the savings it would realize from productivity-enhancing measures, including cost of living adjustments.

As a result of the cooperation among government, labor and private enterprise, the city has survived the fiscal crisis. Collective bargaining too has survived—but with significant changes. This Article discusses the changes in bargaining laws and practices which have emerged as a result of the fiscal crisis, such as productivity bargaining and gain-sharing, coalition bargaining, the use of salary review panels, and the emergence of the city's ability to pay as a major factor in public sector bargaining. The impact of the fiscal crisis on unions and the workforce is examined, including the effect on job security and manning levels, and the introduction of new concepts in city government and labor relations.

II. Changes in Bargaining Laws and Practices as a Result of the Fiscal Crisis

A. Changes in the Law

In response to a deepening New York City fiscal crisis, New York State established the Municipal Assistance Corporation in June, 1975,⁶ as a special agency with power to market securities. In September, the state legislature passed the Financial Emergency Act of 1975 (FEA),⁷ declaring a financial emergency in the City of New York,⁸ creating the Emergency Financial Control Board (EFCB)⁹ which was given the power to supervise and control the city's financial affairs and imposing a wage freeze on public employees.¹⁰ One section of the FEA

5. See N.Y. RETIRE. & SOC. SEC. LAW § 179(1) (McKinney Supp. 1981-82); see also ch. 868 [1975] N.Y. Laws 1421 as amended by ch. 870 [1975] N.Y. Laws 1452 (McKinney).

6. N.Y. PUB. AUTH. LAW § 3033 (McKinney 1981).

7. Ch. 868, [1975] N.Y. Laws 1405 (McKinney).

8. *Id.* § 1.

9. *Id.* § 5.

10. *Id.* §§ 7-9, 10(1).

specifically provided that “[n]othing contained in this act shall be construed to impair the right of employees to organize or to bargain collectively.”¹¹ However, the EFCB was required to approve all collective bargaining agreements between the city and its employees before they became effective,¹² thus potentially affecting the outcome of collective bargaining.

The impact of the FEA wage freeze provision was softened somewhat by another section of the act which exempted public employees from the freeze if their representatives voluntarily agreed to accept a deferral of wage increases.¹³ Most of the city’s unions took advantage of this provision and voluntarily entered into a wage deferral agreement with the city, agreeing to defer a six percent increase that already had been negotiated for the second year of a two-year agreement.¹⁴ In exchange for the deferral, the city agreed that the amount of the increase would be included in the salary rate during the period of deferral for purposes of computing retirement benefits,¹⁵ and that the employer would seek to repay the deferred increases by June 30, 1978, if certain prescribed conditions had been met.¹⁶

In June, 1978, amendments to the Financial Emergency Act, which made a number of significant changes in the act, were signed into law.¹⁷ The Emergency Financial Control Board was renamed the

11. *Id.* § 3(3).

12. *Id.* § 7(1)(e). Section 7(1)(h) empowered the Emergency Financial Control Board to “issue . . . such orders as it deems necessary to accomplish the purposes of this act.”

13. *Id.* § 10(2).

14. *See* Wage Deferral Agreement entered into on Oct. 9, 1975 between the City of New York and other public employers and various unions, including District Council 37, AFSCME, AFL-CIO; City Employees Union, Local 237; I.B.T.; and Uniformed Sanitationmen’s Association, Local 831, I.B.T. [hereinafter cited as Wage Deferral Agreement]. Depending upon an employee’s salary level, two, four or the entire six percent increase was deferred for a period of one year. Without the agreement to defer payment of the negotiated increase, as much as six percent of the workforce would have been laid off. *Id.* Art. II, Sec. 1.

15. Wage Deferral Agreement, *supra* note 14, Art. II, Sec. 3.

16. *Id.* Art. III, Sec. 1. These conditions were: (1) that the city have a balanced budget; (2) that the city be able to sell its obligations in the then prevailing market; and (3) that the amount of the repayment not exceed the amount accrued to the credit of an Employer Deferral Liability Account consisting of savings resulting from productivity improvements and employee attrition. *Id.* Sec. 4. The repayment date has been extended to July 1, 1982 or “whenever thereafter the stated conditions are met,” because of an award rendered by the three impartial members of the Board of Collective Bargaining serving as an arbitration panel in *Coalition Unions v. City of New York*, No. A-743-78/1-141-78, slip op. at 44 (Office of Collective Bargaining, July 20, 1978), in accordance with the dispute resolution provisions of Article X of the Wage Deferral Agreement.

17. N.Y. UNCONSOL. LAWS §§ 5401-5420 (McKinney 1979 & Supp. 1981-82) (Ch. 201 [1978] N.Y. Laws 391-435 (McKinney)).

Financial Control Board (FCB) and its term was extended until the year 2008, thus giving the board a more permanent role in New York City affairs.¹⁸ The amendments also imposed a new criterion to which impasse panels had to accord substantial weight in rendering awards: the city's "financial ability . . . to pay the cost of any increase in wages or fringe benefits without requiring an increase in the level of city taxes existing at the time of the commencement of [the impasse proceeding]."¹⁹ The 1978 amendments provide that the Board of Collective Bargaining,²⁰ when reviewing an impasse panel award providing for an increase in wages or fringe benefits, shall make a threshold determination of the financial ability of the city to pay the cost of such increases²¹ and that at the request of any party to the impasse proceedings, the Appellate Division, First Department of the New York Supreme Court, shall review *de novo* the threshold deter-

18. N.Y. UNCONSOL. LAWS § 5418 (McKinney 1979). The 1978 amendments to the FEA (1978 FEA) provide for the suspension of the Financial Control Board's functions prior to the year 2008 provided that at that time there are no federal loan guarantees outstanding and that the city's expense budget has been balanced for three consecutive years in accordance with generally accepted accounting principles. *Id.* § 5402(12).

19. *Id.* §§ 5408(3)(a), (h). Under the New York Collective Bargaining Law (NYCCBL), NEW YORK, N.Y., ADMIN. CODE ch. 54 (1975 & Supp. 1981-82), disputes arising from contract negotiations may be submitted to an impasse panel. *Id.* § 1173-7.0(c). An impasse is found to exist if the parties agree that an impasse exists and if the Director of the Office of Collective Bargaining, *see* note 20 *infra*, is persuaded that it exists. An impasse also may be found to exist if the Board of Collective Bargaining determines, upon the request of one party and after an investigation by the director, that an impasse has been reached. The parties select one or three individuals to serve as an impasse panel, chosen from a register of neutrals approved by the city and labor members of the Board of Collective Bargaining. The NYCCBL authorizes impasse panels to mediate some or all of the issues in dispute. If the mediation efforts are unsuccessful, the panel is authorized to conduct hearings, take testimony and make findings and recommendations. NEW YORK, N.Y., ADMIN. CODE ch. 54 § 1173-7.0(c). *See also* Impasse Under the NYCCBL, Office of Collective Bargaining, City of New York 1-3.

20. The Board of Collective Bargaining is one of two boards which carry out the functions of the New York City Office of Collective Bargaining (OCB), an impartial adjudicative agency which administers the New York Collective Bargaining Law (NYCCBL), NEW YORK, N.Y., ADMIN. CODE ch. 54 (1975). The NYCCBL governs matters concerning union representation and certification and the collective bargaining process including the duty to bargain, arbitration of grievances and the resolution of contract impasses. The Board of Collective Bargaining, composed of two city representatives, two labor representatives and three impartial members, adjudicates all matters before the OCB except those regarding certification of union members, which are decided by the three impartial members who comprise the Board of Certification. Structure and Functions of the OCB, Office of Collective Bargaining, City of New York 1-3.

21. N.Y. UNCONSOL. LAWS § 5408(3)(b) (McKinney 1979).

mination of the city's financial ability to pay.²² The FCB may intervene, however, as a party on the issue of ability to pay and appear before an impasse panel, before the Board of Collective Bargaining, or before a reviewing court.²³

The constitutionality of the wage freeze provision of the FEA was challenged and upheld by the New York courts. The Patrolmen's Benevolent Association (PBA), in *Patrolmen's Benevolent Association v. City of New York*,²⁴ alleged that the provision violated the contract clause of the United States Constitution.²⁵ The litigation arose out of a dispute between the city and the PBA²⁶ in which the city refused to implement a six percent wage increase that had been awarded to the PBA by an impasse panel²⁷ and confirmed by court judgment prior to the enactment of the FEA.²⁸ Both the state supreme court and the appellate division²⁹ avoided the constitutional issues raised by the PBA and found that the wage freeze provisions of the FEA, while applicable to collective bargaining agreements and to impasse panel awards,³⁰ did not preclude the enforcement of an award which had

22. *Id.* § 5408(3)(e). The 1978 FEA's provision for substantive review of the threshold determination is a departure from the usual role of the courts in the area of labor-management relations. Generally, in labor relations matters, courts prefer to rely upon the determinations of neutrals who have been selected by the parties and who possess special expertise in labor matters. In *City of Buffalo v. Rinaldo*, 41 N.Y.2d 764, 364 N.E.2d 817, 396 N.Y.S.2d 152 (1977), which predates the "ability to pay" amendments of the 1978 FEA, a dispute arose over the terms of an agreement between the city and its police officer union. The dispute was submitted to an impasse panel which was required to consider the city's ability to pay pursuant to the Taylor Law, N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1981-82). The New York Court of Appeals, reversing the intermediate appellate court, held that the findings on the issue of ability to pay were within the province of the panel and that judicial review must be limited to determining whether these findings were arbitrary and capricious. *Rinaldo*, 41 N.Y.2d at 766, 364 N.E.2d at 818, 396 N.Y.S.2d at 153.

23. N.Y. UNCONSOL. LAWS § 5408(3)(g) (McKinney 1979).

24. 41 N.Y.2d 205, 359 N.E.2d 1338, 391 N.Y.S.2d 544 (1976).

25. U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts. . .").

26. The PBA was one of the unions which had refused to sign a voluntary wage deferral agreement with the city. 32 RECORD OF N.Y.C.B.A. 462 (1977).

27. *City of New York v. Patrolmen's Benevolent Ass'n.*, No. I-115-74 (Office of Collective Bargaining, Apr. 30, 1975) (Coulson, Gellhorn, Stein, Arbs.).

28. 41 N.Y.2d at 206, 359 N.E.2d at 1339, 391 N.Y.S.2d at 545.

29. 52 A.D.2d 43, 46, 382 N.Y.S.2d 494, 496 (1st Dep't 1976).

30. In a separate matter involving contract negotiations in 1976 between the city and the Patrolmen's Benevolent Association of the District Attorney's offices, the New York Supreme Court specifically held that impasse panels, as part of the collective bargaining process, are subject to the wage freeze provisions of the FEA. The court noted that section 7 of the FEA provides that wage controls apply to "collective bargaining agreements or other analogous contracts." *Higgins v. Anderson*, 97 L.R.R.M. 2481, 2482 (1977).

been reduced to judgment.³¹ The court of appeals affirmed, holding that the language of the wage freeze provision was not intended to be used to suspend a court judgment.³²

In *Subway-Surface Supervisors' Association v. New York City Transit Authority*,³³ the New York Court of Appeals expressly upheld the constitutionality of the FEA wage freeze provision. Although the court recognized that the wage freeze impaired contract rights,³⁴ it found that the provision did not violate the contract clause of the United States Constitution.³⁵ In so holding, the court relied on the well-settled rule that the "State, in the exercise of its police power, may override the provisions of a contract when the impairment is reasonable and necessary to serve an important public purpose."³⁶ It was undisputed, said the court, that the alleviation of the fiscal crisis served "an important public purpose."³⁷

The court found the imposition of the wage freeze on the employees of the Transit Authority to be necessary to the achievement of a public purpose because millions of dollars would be saved.³⁸ The wage freeze provision was deemed reasonable because it "effected a limited intrusion on the contract rights petitioner had secured for the employees represented by it under the collective bargaining agreement; there was neither termination of existing employment nor deprivation of payment for services that had been rendered in the past."³⁹

31. 41 N.Y.2d at 207-08, 359 N.E.2d at 1340, 391 N.Y.S.2d at 546.

32. *Id.* at 208, 359 N.E.2d at 1340-41, 391 N.Y.S.2d at 546.

33. 44 N.Y.2d 101, 375 N.E.2d 384, 404 N.Y.S.2d 323 (1978). *See also* Committee of Interns and Residents v. City of New York, 87 Misc. 2d 504, 386 N.Y.S.2d 177 (1976) (FEA wage freeze provision was a reasonable exercise of state's police power and did not impair plaintiffs' collective bargaining agreement, deprive plaintiffs of property without just compensation, violate the Bankruptcy and Supremacy Clauses of the Federal Constitution, undermine petitioners' right to bargain collectively, or deny to petitioners equal protection of the law.).

34. 44 N.Y.2d at 113, 375 N.E.2d at 391, 404 N.Y.S.2d at 330.

35. *See* note 25 *supra*.

36. 44 N.Y.2d at 109, 375 N.E.2d at 388, 404 N.Y.S.2d at 328, *citing* United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977). *See also* Home Bldg. and Loan Ass'n. v. Blaisdell, 290 U.S. 398, 437 (1934) ("[t]he economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts"). Public contracts are construed strictly in favor of the state as a general rule. *See* B. SCHWARTZ, CONSTITUTIONAL LAW 230 (2d ed. 1979).

37. 44 N.Y.2d at 110, 375 N.E.2d at 389, 404 N.Y.S.2d at 328.

38. *Id.* at 111-12, 375 N.E.2d at 389-90, 404 N.Y.S.2d at 329. The court also noted that some deference to a legislative assessment of reasonableness and necessity is appropriate when legislation impairing public contracts is at issue. *Id.* at 112, 375 N.E.2d at 390, 404 N.Y.S.2d at 329.

39. *Id.* at 113, 375 N.E.2d at 390, 404 N.Y.S.2d at 330. The petitioner, as bargaining representative of several classes of personnel employed by the Transit Authority, also challenged the wage freeze legislation as an unconstitutional impair-

The 1978 amendments to the FEA were challenged by the PBA in *DeMilia v. State of New York*,⁴⁰ on the grounds that they violated the equal protection clauses of both the United States⁴¹ and New York State⁴² Constitutions. Specifically, the PBA alleged that the FEA

ment of the right to pension benefits protected by N.Y. CONST. art. V, § 7, and as a denial of equal protection of the laws under U.S. CONST. amend. XIV, § 1, and N.Y. CONST. art. I, § 11. The court promptly disposed of the pension benefit issue noting that, pursuant to a wage deferral agreement with the Transit Authority entered into by the petitioner on March 10, 1977, pension benefits were computed as though the deferred wage increases had been paid, *see* notes 14-15 *supra* and accompanying text, and, therefore the wage freeze provision did not affect pension benefits. Since no impairment of the right to pension benefits occurred, the court remitted the case to special term for dismissal of the petition insofar as it sought a judgment that the FEA violated article 5, § 7 of the N.Y. State Constitution. 44 N.Y.2d at 108-09, 375 N.E.2d at 388, 404 N.Y.S.2d at 327-28. With respect to the equal protection claim, the court rejected the petitioners' argument that the FEA gave bondholders a preferred position over that of employees subject to the wage freeze. The court stated that even if it were to accept the petitioner's argument that the rights of bond and note holders were unaffected by the wage freeze while employees were deprived of future wage increases, it nonetheless would find no denial of equal protection. *Id.* at 114, 375 N.E.2d at 391, 404 N.Y.S.2d at 331. There is a significant difference, said the court, between the "impairment of governmental obligations arising out of contracts under which the engagement of the other contracting party is still executory and impairment of those arising out of contracts fully performed." *Id.* Moreover, the court stated that the differentiation might be a valid exercise of legislative discretion, considering that the impairment of the right of bond holders to payment would have a significantly greater impact on governmental operations than the impairment of the right of employees to wage increases.

A default by the city on its promises to its lenders might be expected to have consequences affecting the ability of the city to obtain funds for the performance of its governmental functions well into the future and in a scope far broader than might be expected to attend the imposition of a suspension of wage increase payments.

Id. However, while the court of appeals has permitted the city to avoid contractual obligations for the payment of wages, it has not permitted the city to ignore its non-wage contractual obligations. In *Flushing Nat'l Bank v. Municipal Assistance Corp.*, 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976), the court struck down the New York State Emergency Moratorium Act for the City of New York, ch. 874 [1976] N.Y. Laws 22 (McKinney), which barred actions to enforce the city's short-term obligations for three years, as unconstitutional under N.Y. Const. art. VIII, § 2. The full faith and credit provision of the state constitution prohibits the city from contracting any indebtedness unless it pledges its "faith and credit" for the payment of the principal and interest of the indebtedness. *Id.* This pledge, said the court, constitutes both a promise to pay and a promise to use in good faith the city's revenue powers to raise the funds to pay. 40 N.Y.2d at 735, 358 N.E.2d at 851, 390 N.Y.S.2d at 25. The Emergency Moratorium Act permitted the city to ignore its pledge, and since the constitutional requirement was designed specifically to protect rights which would be vulnerable in times of financial constraint, the court found the Act unconstitutional. *Id.* at 732-33, 36, 358 N.E.2d at 850, 852, 390 N.Y.S.2d at 24, 26.

40. 96 Misc. 2d 77, 412 N.Y.S.2d 953 (Sup. Ct. N.Y., County 1978), *modified*, 72 A.D.2d 536, 421 N.Y.S.2d 70 (1st Dep't 1979), *appeal denied*, 48 N.Y.2d 611, 425 N.Y.S.2d 1027, *cert. denied*, 447 U.S. 922 (1980).

41. U.S. CONST. amend. XIV, § 1.

42. N.Y. CONST. art. I, § 11.

amendments placed it in a different position than other police organizations in the state since state police unions are not subject to the "ability to pay" amendment of the New York City Collective Bargaining Law (NYCCBL).⁴³ The Supreme Court, New York County rejected the PBA's equal protection claims noting that the NYCCBL impasse procedures apply to all municipal unions in New York City.⁴⁴ Further, the court found that the classification distinctions between New York City and upstate police were reasonable and rationally related to a legitimate state purpose, thus complying with equal protection requirements.⁴⁵

In 1978, the same year that the FEA amendments were passed, the United States Congress enacted the New York City Loan Guarantee Act,⁴⁶ providing federal loan guarantees to the city. These guarantees are subject to strict conditions, one of which is that the city establish a joint labor management productivity council to "develop and seek to implement methods for enhancing the productivity of the city's labor force."⁴⁷ The act mandates that a representative of the Financial Control Board serve as an observer to the productivity council⁴⁸ and that the board report annually on the operations of the council to the United States Secretary of the Treasury and to the public.⁴⁹

A joint labor management productivity council was created by executive order of the Mayor of New York City in 1979.⁵⁰ While the productivity council has been criticized for a lack of effectiveness,⁵¹

43. 96 Misc. 2d at 82, 412 N.Y.S.2d at 957. Police unions outside New York City are subject to the impasse procedures of the Taylor Law, N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1981-82), which contain no specific "ability to pay" restrictions.

44. 96 Misc. 2d at 83, 412 N.Y.S.2d at 957.

45. *Id.*, 412 N.Y.S.2d at 957-58.

46. 31 U.S.C. §§ 1521-1531 (Supp. III 1979).

47. *Id.* § 1523(9).

48. *Id.*

49. *Id.*

50. Office of the Mayor, The City of New York, Exec. Order No. 28 (Jan. 26, 1979). Later the same year, a second executive order was issued restructuring the Productivity Council to reflect structural changes in the Mayor's Office. Office of the Mayor, The City of New York, Exec. Order No. 37 (Nov. 15, 1979). As presently constituted, the council includes Deputy Mayor for Operations Nathan Leventhal (Chairman), Director of the Office of Municipal Labor Relations Bruce McIver, City Personnel Director Juan Ortiz, and three representatives of the Municipal Labor Committee (a coalition of municipal labor organizations). In addition, as mandated by the New York City Loan Guarantee Act, 31 U.S.C. § 1523(9) (Supp. III 1979), a representative of the Financial Control Board acts as an observer and attends all meetings of the Council.

51. See *New York City Productivity Council*, Staff Report of New York State Financial Control Board, 3 (Jan. 15, 1980) [hereinafter cited as *Staff Report*]. Bruce McIver, a city representative on the Council, conceded that "[t]he deliberation of the

the council made considerable progress in the fiscal year 1981. It instituted such productivity-enhancing programs as alternative work schedules, work place improvements, and payroll/timekeeping improvements.⁵²

B. Changes in Bargaining Practices

1. Productivity Bargaining

As a result of the fiscal crisis, the city has been forced to take a hard look at the productivity of its work force⁵³ and determine where improvements can be made. Productivity has become an important element in the collective bargaining process and, in some instances, has become a prerequisite for wage increases and continued employment. In 1976, pursuant to the wage freeze legislation then in effect as part of the FEA, the FCB issued wage and salary policies limiting wage increases to cost of living adjustments and providing that these

Productivity Council have [sic] produced little in the way of programmatic initiatives” Letter from Bruce McIver to Comer Coppie, Executive Director of the Financial Control Board (Nov. 29, 1979), *reprinted in Staff Report, supra* at App. C.

52. New York City Office of the Deputy Mayor for Operations, *The Mayor's Management Report* at 22 (Sept. 17, 1981). The Mayor's report on the New York City Productivity Program to the Financial Control Board, dated September 17, 1980, detailed some of the productivity improvements achieved through collective bargaining in the areas of crew size reduction, broadbanding and work assignments. New York City Office of the Deputy Mayor for Operations, Productivity Program for New York City at 18 (Sept. 17, 1980). For a discussion of broadbanding, *see* notes 172-92 *infra* and accompanying text.

53. Productivity has been defined as the relationship between defined units of output (physical product or service performed) per level of input (employees, raw materials or equipment). Increases in productivity can be realized either by raising the level of output for a given level of input (more or better services performed per worker) or by decreasing the level of input (reducing the number of workers while maintaining the same quality and quantity of services). However, unlike the private sector where inputs and outputs can be easily quantified, in the public sector the units of productivity are difficult to define and may be impossible to measure with precision. The feasibility of measuring productivity in the public sector varies, of course, with the service involved. In the area of sanitation, for example, the level of productivity can be determined by examining the number of employees (input) on a shift and the tonnage of refuse collected per shift (output). Police and fire-fighting services, by contrast, do not lend themselves to such objective measurement. Technical shortcomings of a public sector productivity program notwithstanding, efforts in this area predate the fiscal crisis. A “Productivity Program” was announced first in 1972 in an effort to expand organizational improvements and managerial reforms initiated during the administration of Mayor Lindsay. In 1974, the city's first Productivity Council was established to assist in the development of labor-management committees at the agency level. This council was disbanded in 1975 at the onset of the fiscal crisis. *See Staff Report, supra* note 51, at 3-5.

increases were to be funded entirely by savings resulting from increased employee productivity.⁵⁴

Wage increases during the fiscal crisis were not contingent solely upon savings realized through improved employee productivity. For example, the 1978 coalition economic agreement provided two annual increases of four percent.⁵⁵ More recently, through a process known as gainsharing,⁵⁶ employees have negotiated wage incentives in return for their acceptance of new programs for delivering public services. While management might have argued that changes in the method of delivering city services are a management prerogative, it sometimes has found it more advantageous to bargain over such changes. For example, the city voluntarily entered into negotiations with the Uniformed Sanitationmen's Association concerning an incentive program for acceptance by the union of a new side-loading two-man truck to replace the traditional three-man vehicle.⁵⁷ The Deputy Mayor for Operations, Nathan Leventhal, explained that the city agreed to discuss the use of the two-man trucks "in recognition of the fact that it would have been difficult to take advantage of such a technological advance without broad agreement."⁵⁸ The union, in turn, agreed to discuss the introduction of the trucks despite concerns about the effects on the health and safety of its members because it feared that other more burdensome measures, such as the use of private carters, might be employed to improve productivity.⁵⁹

When negotiations about the two-man truck broke down, the city and the sanitation union agreed to submit the issue to an impasse panel. The recommendations of the panel,⁶⁰ which were accepted by both parties, provided that sanitation workers be paid an \$11 differen-

54. These policies were in effect for slightly more than two years and were applicable to all collective bargaining agreements between the city and municipal unions. *Id.* at 6.

55. Coalition Economic Agreement, June 5, 1978, at 9-10. See notes 74-76 *infra* and accompanying text.

56. According to Philip Caruso, President of the Patrolmen's Benevolent Association, the concept of gainsharing is the product of "the fertile imagination of Jack Bigel," consultant to a number of municipal unions. Caruso, *Productivity and Gain-sharing*, Chief-Leader, Mar. 27, 1981, at 4, col. 4.

57. *City and Sanitation Union to Arbitrate Truck Issue*, N.Y. Times, Nov. 26, 1980, at B3, col. 5.

58. *Id.*

59. *Id.*

60. *City of New York v. Uniformed Sanitationmen's Ass'n, Local 831, No. I-157-80* (Office of Collective Bargaining, Dec. 10, 1980) (Kelly, Arb.).

tial for each shift worked on a two-man truck.⁶¹ The differential was provided with the understanding that there would be "one-for-one replacement" of the three-man trucks with the new vehicles,⁶² and was contingent further upon meeting or approximating prior levels of productivity in the Sanitation Department.⁶³ According to the Department, the savings to be realized from this program would result primarily from a reduction in manning through attrition.⁶⁴ The Sanitation Commissioner estimated that eventually 300 jobs could be eliminated without lay offs because of two-man trucks and that this program would save the city \$7 million a year.⁶⁵

Other municipal unions have expressed interest in negotiating financial incentives in return for their acceptance of work rule changes that will lead to increased productivity.⁶⁶ For example, the city entered into negotiations with the PBA concerning expanding the use of one-man patrol cars in exchange for additional compensation.⁶⁷ However, unlike the sanitation union, the PBA sought financial benefits for all police officers, not only those who actually patrol in one-

61. *Id.*, slip op. at 10, 14.

62. *Id.*, slip op. at 11, 15.

63. On May 15, 1981, the city withheld the \$11 bonus from the paychecks of 55 sanitation workers who had fallen short of trash collection goals. In response, the affected sanitationmen instituted a job slowdown. When the two sides could not settle their dispute over the precise goals sanitationmen were supposed to meet to qualify for the differential, it was submitted to a three-man dispute resolution panel. This was in accordance with the impasse panel's award in *City of New York v. Uniformed Sanitationmen's Ass'n Local 831*, No. I-157-80, slip op. at 11-12, 15. The three-man dispute panel worked out a system for monitoring performance standards on the two-man trucks, which standards vary according to the sanitation district in which the new trucks are used. However, essentially the same amount of work done by a three-man crew on the old trucks must be done by a two-man crew on the new trucks to qualify for the \$11 differential. See *Accord Is Reached on Standards for Two-Man Sanitation Trucks*, N.Y. Times, May 29, 1981, at B6, col. 1.

64. *\$11 a Shift Extra is Recommended for 2-Man Truck*, N.Y. Times, Dec. 11, 1980, at B1, col. 6.

65. *Sanitmen Want 6.5G to Operate New Trucks*, Daily News, Dec. 1, 1980, at 50, col. 1.

66. The Sanitation Department has indicated that it is prepared to make some form of incentive payment to sanitation officers if there are significant improvements in productivity. *Sanit. Officers Exploring Plan on Gainsharing*, Chief-Leader, Oct. 2, 1981, at 5, col. 7. District Council 37 is discussing with the city the possibility of paying a premium to motor vehicle operators who exceed the basic per shift quota for automobiles towed away. Conversation between Arvid Anderson and Alan R. Viani, Director of Research and Negotiations, District Council 37 on March 3, 1982.

67. *City and Union Near Accord on One-Officer Patrol*, N.Y. Times, Aug. 27, 1981, at B3, col. 5.

man cars.⁶⁸ In addition, the PBA demanded that safety measures be instituted to provide extra protection to officers in solo patrol cars.⁶⁹

The introduction of the issue of productivity in the collective bargaining process has given rise to a new standard of accountability in the public sector. Increasingly, bargaining for wage increases is contingent upon savings realized through the elimination of costly and outdated work rules by the employer as well as greater output by employees. Moreover, the need for increased productivity has required that labor and management engage in a cooperative effort. In order to maintain acceptable levels of service to the public in periods of fiscal austerity, the city depends upon the goodwill of its workforce; further, it is to labor's advantage to cooperate with an employer who otherwise might be forced to lay off more workers or to contract out work to private enterprise.

2. *Coalition Bargaining*

As a result of the fiscal crisis, the collective bargaining process has become increasingly centralized. More than 400 separate bargaining units negotiated contracts with the city in 1968,⁷⁰ but by 1976 the number of units had been reduced to fewer than 100.⁷¹ In the face of threatened bankruptcy and the mandated review and control by external bodies of New York City's affairs,⁷² municipal unions found that they could enhance their position at the bargaining table by further consolidating the structure of city negotiations. In 1975, the concept of coalition bargaining was born when, on an informal basis, the unions collectively negotiated a wage deferral agreement with the city.⁷³

In 1978, municipal unions again bargained as a coalition for a two-year collective bargaining agreement with the city. The combined unions, representing approximately 200,000 municipal employees,

68. *Id.* Unlike sanitation, where only those who work on two-man trucks have an increased workload, in police work the use of one-man patrols increases the burden on officers patrolling in two-man cars in the same precinct because the two-man cars are the first-response units in emergencies, the solo patrols being used only as back-ups. In addition, one-man patrols are assigned to safer areas.

69. *Id.* As of this writing, the negotiations between the city and the PBA over one-man patrols have been deferred.

70. New York City Office of Collective Bargaining, Annual Report 1980, at 36.

71. *Id.* Since 1976, the number of bargaining units in New York City has been reduced even further and presently stands at 79. New York City Office of Collective Bargaining, Annual Report 1981, at 25.

72. See notes 6-23, 46-49 *supra* and accompanying text.

73. See notes 13-16 *supra* and accompanying text.

were represented at the bargaining table by District Council 37 of the American Federation of State, County and Municipal Employees, the United Federation of Teachers, Local 237 of the International Brotherhood of Teamsters, the Uniformed Sanitationmen's Association and the Sergeants' Benevolent Association.⁷⁴ The representatives of these unions, as a committee, prepared an economic package for submission to the city after approval by all other unions in the coalition.⁷⁵ Centralized bargaining pre-empted all economic items in the 1978 negotiations and resulted in the first coalition economic agreement.⁷⁶ Bargaining with respect to non-cost items continued at the unit level.⁷⁷

One issue in the 1978 coalition negotiations led to a temporary breakdown in bargaining: the repayment of the wage increases that had been voluntarily deferred in 1975.⁷⁸ The three impartial members of the Board of Collective Bargaining, serving as an arbitration/impasse panel pursuant to the wage deferral agreement, held that the city's obligation to repay the deferred increases continued.⁷⁹ The panel concluded that the June 30, 1978 date for repayment was only

74. *Committee Report, supra* note 4, at 761. Police and firefighter unions declined to participate in the coalition negotiations but later accepted the same economic package negotiated by the coalition.

75. Victor Gotbaum, Executive Director of District Council 37 and Chairman of the Municipal Labor Committee (MLC), recognizing that coalition bargaining would be to everyone's advantage, observed that "[t]he city, being scrutinized by Washington and the financial markets will benefit tremendously if we can avoid the headlines and hassles that are usually involved when negotiations stretch out for month after month with each union bargaining separately." Municipal Labor Committee, Press Release, at 2 (Feb. 9, 1978).

76. Coalition Economic Agreement, June 5, 1978.

77. See Lewin & McCormick, *Coalition Bargaining in Municipal Government: The New York City Experience*, 34 INDUS. AND LAB. REL. REV. 175, 184 (1981).

78. The wage deferral agreement provided for repayment of the 160-200 million dollars in deferred raises by June 30, 1978 if, by that date, the city had regained financial stability. See Wage Deferral Agreement, *supra* note 14, Art. III. Both the city and the coalition of unions acknowledged that the conditions for repayment had not been met in 1978. *Committee Report, supra* note 4, at 761. However, the unions maintained that the city's obligation to repay the deferred moneys continued, while the city argued that the raises had lapsed. Specifically, the unions contended that the increases must be repaid whenever the required conditions were satisfied; that is, whenever the city regained a balanced budget and the ability to re-enter normal credit markets. The city's position was that, since fiscal recovery had not been achieved by June 30, 1978, the obligation to repay the deferred raises was extinguished. In order not to deter a final agreement on the coalition pact, both parties agreed to submit their dispute over the repayment issue to arbitration, as provided for in the wage deferral agreement.

79. *Coalition Unions v. City of New York*, No. A-743-78/I-141-78, slip op. at 28, 43 (Office of Collective Bargaining, July 20, 1978) (Anderson, Eisenberg, Schmertz, Arbs.).

an estimate of the earliest date by which recovery conditions might have been met.⁸⁰ To avoid further disruption of the city's four-year fiscal plan, however, the panel ruled that the increases did not have to be paid before June 30, 1982, and that the conditions for repayment would be carried forward.⁸¹

In the next round of bargaining for a 1980-82 "citywide" agreement, bargaining over economic items was conducted by two coalitions of unions, one comprised of uniformed forces and one of non-uniformed employee unions.⁸² Pursuant to the Uniformed Coalition Economic Agreement (UCEA), the uniformed forces received a slightly higher wage increase than the non-uniformed forces in the first year of the two-year agreement.⁸³ The uniformed forces historically have felt that they are entitled to be paid more than their non-uniformed counterparts. It is likely, therefore, that they will continue to operate as a separate bargaining coalition.⁸⁴

Both coalition economic agreements for the 1980-82 period, the UCEA and the Municipal Coalition Economic Agreement (MCEA), carried forward from the 1978 coalition economic agreement the city's obligation to repay the wage increases deferred in 1975.⁸⁵ They also provided for the resolution of disputes by the three impartial members of the Board of Collective Bargaining serving as an arbitration panel,⁸⁶ and further specified that no additional economic demands

80. *Id.* at 29.

81. *Id.* at 42, 45-46.

82. The "uniformed coalition" included the Patrolmen's Benevolent Association, the Uniformed Firefighters Association, the Uniformed Sanitationmen's Association, the Correction Officers Benevolent Association, the Housing Patrolmen's Benevolent Association, the Uniformed Fire Officers Association, the Transit Patrolmen's Benevolent Association and the Marine Engineers Beneficial Association. The coalition of municipal unions, the "non-uniformed coalition," consisted of twenty-five unions including, *inter alia*, District Council 37, AFSCME, AFL-CIO, the United Federation of Teachers, and Local 237, International Brotherhood of Teamsters. The coalition of municipal unions represented more than 200,000 city employees in negotiations for a second coalition economic agreement. Serrin, *A Lasting Uniformed Coalition Planned*, N.Y. Times, July 3, 1980, at B4, col. 4.

83. The MCEA provided for a general wage increase of the greater of 8% or \$900 effective the first day of the applicable separate unit agreement and for an additional general increase of the greater of 8% or \$900 in the second year of the applicable unit agreement. MCEA Sec. 6. The UCEA provided a rate increase of 9% effective July 1, 1980 and an additional 8% effective July 1, 1981. UCEA, Sec. 5.

84. Serrin, *A Lasting Uniformed Coalition Planned*, N.Y. Times, July 3, 1980, at B4, col. 4. A third municipal bargaining coalition has been established for the 1982-84 negotiations, consisting of superior officer groups in the city's uniformed departments. *Superior Officer Group to Bargain as 3rd Coalition*, Chief-Leader, Mar. 19, 1982 at 1, col. 2.

85. MCEA, Sec. 12; UCEA, Sec. 12.

86. MCEA, Sec. 11(a); UCEA, Sec. 11(a).

could be made during the terms of the agreements.⁸⁷ To date, there have been two cases decided by the impartial members of the board involving "additional economic demands."⁸⁸

The first of these disputes concerned a demand by the Detectives' Endowment Association, the union representing police detectives in the New York City Police Department.⁸⁹ The union argued that the 100-hour limitation or "cap" on overtime duty for which detectives may receive cash compensation should be eliminated.⁹⁰ The city contended that the union's demand would produce an additional cost to the city and that such an additional "economic demand" or "further cost-related demand" was precluded under the terms of both coalition economic agreements.⁹¹ The panel agreed and rejected the demand.⁹² The second case arose from a demand by District Council 37 for additional salary adjustments for ambulance employees of the Emergency Medical Service of the New York City Health and Hospitals Corporation.⁹³ The impartial members of the Board of Collective Bargaining, serving as an impasse panel pursuant to the dispute resolution provision of the MCEA,⁹⁴ rejected the union's demands as "additional economic demands."⁹⁵

87. MCEA, Sec. 3; UCEA, Sec. 3.

88. *City of New York v. Detectives' Endowment Ass'n*, No. A-1243-81 (Office of Collective Bargaining, May 26, 1981) (Anderson, Collins, Eisenberg, Arbs.); *City of New York v. District Council 37*, No. A-1302-81 (Office of Collective Bargaining, Oct. 9, 1981) (Anderson, Collins, Eisenberg, Arbs.).

89. *City of New York v. Detectives' Endowment Ass'n*, No. A-1243-81 (Office of Collective Bargaining, May 26, 1981) (Anderson, Collins, Eisenberg, Arbs.).

90. *Id.*, slip op. at 3.

91. *Id.* at 3, 6. Although the Detectives' Endowment Association (DEA) participated in the negotiations of the nonuniformed coalition, along with other unions of superior uniformed officers, including the Captains' Endowment Association, the Lieutenants' Benevolent Association and the Sergeants' Benevolent Association, there was an issue as to whether the DEA agreed to the terms of the MCEA or to those of the UCEA. However, both agreements expressly provided that they were intended to cover "all economic matters" (MCEA) or "all cost-related matters" (UCEA) and that, in consideration of the economic benefits granted under the coalition economic agreements, no party to either agreement could make "additional economic demands" (MCEA, Sec. 3) or "further cost-related demands" (UCEA, Sec. 3) during the terms of the coalition economic agreements or during negotiations for the terms of separate unit agreements. Since the agreements were substantially similar, the impartial members of the Board of Collective Bargaining, sitting as an arbitration panel, found it unnecessary to determine which agreement applied. *Id.* at 4-5, 20.

92. *Id.* at 23-24.

93. *City of New York v. District Council 37*, No. A-1302-81 (Office of Collective Bargaining, Oct. 9, 1981) (Anderson, Collins, Eisenberg, Arbs.).

94. *Id.* slip op. at 1; see MCEA Sec. 11(a).

95. No. A-1302-81, slip op. at 8-9. An exception was made for employees in the paramedic title because a salary review panel established under the MCEA had mandated further bargaining for this group. *Id.* at 4, 9.

While the fiscal crisis necessitated restraint in wage increases for city workers, the disparity between public and private sector salaries has prevented the city from recruiting and retaining an adequate workforce in certain occupations. To address this problem, the MCEA contained an innovative provision establishing a tripartite salary review panel "to review and make recommendations on the wage and salary rates of any occupational group for which there are both recruitment and retention problems."⁹⁶ The salary review panel received applications covering fifty-six occupational groups and 28,379 employees.⁹⁷

A salary review panel also was used to resolve a dispute between the city and the New York State Nurses Association, the collective bargaining representative for employees in a variety of nursing titles in city hospitals.⁹⁸ The association maintained that, due to the low salaries paid to city nurses as compared to salaries of nurses employed in the private sector, there was a serious recruitment and retention problem.⁹⁹ When negotiations became deadlocked, the dispute was submitted to a one-man impasse panel, which recommended the creation of a tripartite salary review panel to consider the recruitment and

96. MCEA, Sec. 10.

97. Pursuant to the MCEA, written applications for consideration by the salary review panel could be submitted by interested signatories within 120 days of approval of the agreement by the Financial Control Board. MCEA, Sec. 10. The panel, which consisted of a member appointed by the Municipal Labor Committee, a member appointed by the City of New York, and an impartial member chosen by the other two, reviewed the applications submitted and conducted hearings on those titles or occupational groups which it had determined warranted further consideration. Final recommendations were made on July 30, 1981 concerning some eighteen occupational groups including, for example, accountants, computer operators, engineers and social workers. Decisions and Awards of the Salary Review Panel, July 30, 1981, at 1-2 (Rubin, Karetzky, Viani, Arbs.) and Addenda to Salary Review Decisions, dated Aug. 4, 1981, Sept. 25, 1981, Oct. 13, 1981, and Feb. 5, 1982; *Pay Panel Urges Awards to 18 Employee Groups*, Chief-Leader, Aug. 7, 1981, at 1, col. 1 and 7, col. 2. These recommendations have been approved by the Deputy Mayor for Operations, the Financial Control Board and the Department of Finance, and currently are being implemented. *Leventhal OKs Panel Determinations*, Chief-Leader, Aug. 14, 1981, at 3, col. 1; *Most Pay Panel Awards Delayed Until Jan. 29*, Chief-Leader, Dec. 25, 1981, at 3, col. 4.

98. *City of New York v. New York State Nurses Ass'n*, No. I-154-80 (Office of Collective Bargaining, Jan. 23, 1981) (Wildebush, Arb.), *aff'd*, *City of New York v. New York State Nurses Ass'n*, No. B-3-81 (Board of Collective Bargaining, Feb. 3, 1981). This decision constitutes the "Final Opinion" of the impasse panel, and includes the following: Recommendations of the Impasse Panel (Oct. 17, 1980), Report of the Impasse Panel (Oct. 24, 1980), Recommendations of the Salary Review Panel (Nov. 22, 1980), Supplementary Recommendations of the Impasse Panel (Dec. 4, 1980) and the Opinion of the Salary Review Panel (Jan. 12, 1981).

99. *City of New York v. New York State Nurses Ass'n*, No. I-154-80, slip op. at 3 (Office of Collective Bargaining, Jan. 23, 1981) (Wildebush, Arb.).

retention issue.¹⁰⁰ The impasse panel retained jurisdiction, however, to ensure that the salary review panel accomplished its intended purpose. This salary review panel recommended the payment of experience differentials to nurses with seven, ten and fifteen years of experience.¹⁰¹ Its recommendations were accepted by the impasse panel which incorporated the salary review panel's recommendations in a final opinion, issued on January 23, 1981.¹⁰²

Although the fiscal crisis was largely responsible for the emergence of coalition bargaining, this innovation is likely to endure even after the fiscal crisis has ended. It is fair to assume that, for some occupations, public sector salaries will continue to lag behind private sector salaries. A salary review panel will aid the city in its efforts to recruit and retain an adequate and qualified workforce and will be especially useful in light of the increasing number of specialized occupations for which personnel are in short supply.

3. *The City's Ability to Pay*

a. *Limitations on Bargaining Demands*

Traditionally, the city's ability to pay its employees was not a major issue in collective bargaining because the power to levy taxes to finance wages was presumed to be unlimited. However, the fiscal crisis necessitated certain restrictions on the city's taxing ability and reduced the funds available to the city for the payment of wages. Since 1978, however, when the state legislature amended the Financial Emergency Act of 1975, directing impasse panels to consider the city's ability to pay wage increases before rendering an award,¹⁰³ ability to pay has been a significant factor in public sector labor negotiations in New York City.

100. *City of New York v. New York State Nurses Ass'n*, No. I-154-80, slip op. at 3 (Recommendations of the Impasse Panel, Oct. 17, 1980).

101. *City of New York v. New York State Nurses Ass'n*, No. I-154-80, slip op. at 3 (Recommendations of the Salary Review Panel, Nov. 22, 1980) (Rubin, Karetzky, Rooney, Arbs.).

102. *City of New York v. New York State Nurses Ass'n*, No. I-154-80 (Final Opinion, Jan. 23, 1981) (Wildebush, Arb.). The award of the citywide salary review panel, established pursuant to the MCEA, recommended increases in minimum salary rates, tuition reimbursements and uniform allowances for certain nursing titles not covered by the arbitrator's award.

103. N.Y. UNCONSOL. LAWS §§ 5408(3)(a), (h) (McKinney 1979). See note 19 *supra* and accompanying text. Even before the enactment of the FEA Amendments, however, the NYCCBL prescribed that impasse panels consider "the interest and welfare of the public" in rendering an award. NEW YORK, N.Y., ADMIN. CODE ch. 54, § 1173-7.0(c)(3)(b)(4) (1975). This factor has been interpreted consistently to include the employer's financial ability to pay. For example, in *Community Action for Legal*

As originally drafted, the ability to pay amendment included two limitations on bargaining demands. It forbade any award which would require an increase in the level of taxes above the level that existed at the time the impasse arose, and any award which would require a reduction in the level of municipal services.¹⁰⁴ However, the second limitation was deleted from the final bill. In the 1980 negotiations for a citywide agreement, the unions and the city both were reluctant to use the amended impasse procedures.¹⁰⁵ The city may have been reluctant to risk an award which could be funded only by further decreasing the level of municipal services,¹⁰⁶ while the municipal unions may have felt that the ability to pay provision precluding the city from financing a settlement by increasing the level of taxes would be an obstacle to a fair decision by an impasse panel. In addition, both parties may have wished to avoid *de novo* court review of the threshold determination of the ability to pay issue.¹⁰⁷

Impasse panel recommendations in New York City are final and binding if not rejected or appealed by a party to the dispute within prescribed time limits.¹⁰⁸ However, if implementation of any part of an impasse award requires the enactment of a law, the provision does not become binding until the appropriate legislative body enacts such a law.¹⁰⁹ Thus, if there are insufficient funds in the budget to cover a recommended wage increase, the award may not be implemented until the necessary appropriation is made. This clause, which has been part of the NYCCBL since 1972, further restricts the power of the

Servs. Inc. v. Legal Servs. Staff Ass'n, No. I-110-74, slip op. at 4-5 (Nov. 13, 1974), the single-member impasse panel noted that:

[I] am bound by the requirements of the City Labor Law [section 1173-7.0(c)(3)(b)] which requires that I take into account the interest of the public. This has come to mean the ability of the City to pay and the extent to which services rendered may have to be curtailed if funds are unavailable.

104. See *Committee Report*, *supra* note 4, at 758.

105. *Id.*

106. *Id.* The authors note that the question of whether an impasse panel could render legally an award which requires the city to fund an increase in wages or fringe benefits by eliminating or decreasing present services remains unanswered.

107. *Id.* at 759. To date the 1978 FEA's *de novo* review procedure has not been used by any party subject to the NYCCBL. The ability to pay provision is due to expire on Dec. 31, 1982, N.Y. UNCONSOL. LAWS § 5408(3)(i) (McKinney 1979).

108. NEW YORK, N.Y., ADMIN. CODE ch. 54, § 1173-7.0(c)(3)(e) (1975).

109. *Id.* This proviso applies equally to a final determination of the Board of Collective Bargaining when it is called upon to review the report and recommendations of the impasse panel. *Id.* § 1173-7.0(c)(4)(e).

parties, an impasse panel, or the Board of Collective Bargaining, to exceed the confines of the city's budget.¹¹⁰

b. Reconsideration of the Strike Weapon

The effect of the New York City fiscal crisis on the city's ability to pay also has reduced the incidence of public sector strikes. Although it is illegal for public employees in New York State to strike,¹¹¹ there have been a number of strikes in the past. In a time of fiscal constraint, however, engaging in a strike can be a futile exercise. Albert Shanker, President of the United Federation of Teachers, recognized this when, after a one-week strike of teachers in 1975, he observed that "a strike is a weapon you use against the boss who has money. This boss has no money."¹¹² While the fiscal crisis has not been the sole cause of the decline in public sector strikes,¹¹³ it has been a significant factor along with the strict enforcement of the penalty provisions of the New York State Taylor Law by the New York State Public Employment Relations Board (PERB) and the courts.¹¹⁴

110. *Id.*

111. N.Y. CIV. SERV. LAW § 210(1) (McKinney 1973).

112. *Teachers Vote to Return But Many Object to Pact; Schools Open Tomorrow*, N.Y. Times, Sept. 17, 1975, at 28, col. 5.

113. Another reason for the decline in strikes, which predates the fiscal crisis, is the enactment of the state's Taylor Law in 1967, which imposes strict penalties and forfeitures on a striking union. See N.Y. CIV. SERV. LAW §§ 210(2)(g) (mandatory deduction of two days pay for each day an individual employee is on strike); 210(3) (forfeiture of striking union's right to deduct membership dues and to deduct an equivalent amount from the salaries of non-member unit employees for such time as the State Public Employment Relations Board determines, including an indefinite time) (McKinney 1973 & Supp. 1981). Still another factor contributing to the decline in the number of strikes in the public sector may be the availability of impasse arbitration.

114. See note 113 *supra*. In October 1981, PERB enforced Taylor Law penalties against three New York City transit unions responsible for the 1980 strike, suspending their dues deduction privileges for eighteen months. *Local 100, Transport Workers Union of America v. New York City Transit Auth.*, 14 N.Y. PUB. EMP. REL. BD. ¶ 3074 (1981). In *In re United Fed'n of Teachers, Local 2*, 14 N.Y. PUB. EMP. REL. BD. ¶ 3073 (1981), PERB upheld its 1976 suspension of the United Federation of Teachers' dues checkoff privileges, imposed as a penalty for the union's five-day strike in 1975. The state Judiciary Law, N.Y. JUD. LAW § 751 (McKinney 1975), specifies that willful participation in a strike by a public employee union in violation of the Taylor Law constitutes a criminal contempt punishable by a fine fixed by the court. In 1981, a state supreme court enforced this provision against the transit unions for the 1980 strike and imposed substantial fines. *New York City Transit Auth. v. Lindner*, N.Y.L.J., Apr. 9, 1980, at 1, col. 2 (Sup. Ct. Kings County), *aff'd*, N.Y.L.J. July 16, 1981, at 10, col. 4 (2d Dep't). In *Health and Hosps. Corp. v. Committee of Interns*

III. The Impact of the Fiscal Crisis on Municipal Unions and the Work Force

A. Job Security

Since the commencement of the fiscal crisis there has been a substantial reduction in the city's work force with twenty percent fewer city employees in 1980 than in 1975.¹¹⁵ In addition, as of 1980, city expenditures had been reduced by twenty-one percent.¹¹⁶ Faced with the threatened elimination of jobs, municipal unions agreed to forego financial benefits, including wage increases, in exchange for promises by the city not to lay off additional bargaining unit members for the term of an agreement.¹¹⁷ Prior to the fiscal crisis, both PERB and the New York City Board of Collective Bargaining had held that elimination of jobs and layoffs were not mandatory subjects of negotiation.¹¹⁸ Beginning in 1975, however, unions demanded bargaining over the related issues of job security provisions,¹¹⁹ lay off procedures,¹²⁰ and the impact of layoffs on employees who had been or were about to be laid off.¹²¹

The Board of Collective Bargaining first ruled, in *City of New York v. MEBA, District No. 1, Pacific Coast District*,¹²² that, although the decision to lay off employees is not a mandatory subject of negotiations, the impact of a lay off must be bargained. Specifically, the

and Residents, N.Y.L.J. May 8, 1981, at 7, col. 1 (Sup. Ct. N.Y. County), the court held the union in contempt for the strike of resident physicians in municipal hospitals in 1981, and imposed fines of \$175,000.

115. R. HORTON & M. McCORMICK, *SETTING MUNICIPAL PRIORITIES: (1981)*, cited in draft form in City of New York, *Productivity Program for New York City*, at 28 (submitted to Financial Control Board Sept. 17, 1980).

116. *Id.*

117. Committee on Labor and Social Security, *Impact of the Fiscal Crisis and the State Financial Emergency Act on the Structure and Scope of Collective Bargaining, Part II*, 32 RECORD OF N.Y.C.B.A. 462, 464 (1977).

118. *City School Dist. of New Rochelle v. New Rochelle Fed'n of Teachers, Local 280*, 4 N.Y. PUB. EMP. REL. BD. ¶ 3060 (1971); *District Council 37 v. City of New York*, No. B-1-70 (Board of Collective Bargaining, Feb. 26, 1970); *Association of Bldg. Inspectors v. Housing and Dev. Admin.*, No. B-4-71 (Board of Collective Bargaining, Jan. 18, 1971).

119. *City of New York v. MEBA, Dist. No. 1, Pac. Coast Dist.*, No. B-3-75 (Board of Collective Bargaining, Feb. 6, 1975).

120. *District Council 37 v. City of New York*, No. B-18-75 (Board of Collective Bargaining, June 16, 1975).

121. *City of New York v. District Council 37*, No. B-21-75 (Board of Collective Bargaining, July 16, 1975), *aff'd sub nom. City of New York v. Board of Collective Bargaining*, N.Y.L.J., Mar. 18, 1976, at 7, col. 2 (Sup. Ct. N.Y. County).

122. *City of New York v. MEBA, Dist., No. 1, Pac. Coast Dist.*, No. B-3-75 (Board of Collective Bargaining, Feb. 6, 1975).

board held that a job security provision which included language committing the employer to attempt to retain all permanent per annum employees and to re-hire such employees when vacancies occurred was not a mandatory subject of bargaining.¹²³ However, the board found that another element of the job security clause, requiring that lay offs be discussed with the union before implementation, was a mandatory subject.¹²⁴ The board held that a management decision to lay off employees necessarily has a "practical impact" and that the city was obligated to bargain immediately "with respect to those issues over which the employer has discretion to act, and which relate to the practical impact of [its] managerial decision to lay off employees."¹²⁵

123. *Id.*, slip op. at 11-12. The board relied on the decision of the Public Employment Relations Board in *City School Dist. of New Rochelle v. New Rochelle Fed'n of Teachers*, 4 N.Y. PUB. EMP. REL. Bd. ¶ 3060 (1971), which held that an employer's decision to make budget cuts and lay off employees is a non-mandatory subject of bargaining. The board also applied NEW YORK, N.Y., ADMIN. CODE ch. 54, § 1173-4.3b, which gives the city the unilateral right "to relieve its employees from duty because of lack of work or for other legitimate reasons":

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

Id.

124. A demand for information and negotiation prior to implementation of layoffs did not, in the Board's view, interfere with the employer's right to curtail or eliminate a service. No. B-3-75, slip op. at 12.

125. *Id.* at 14. See also *City of New York v. Uniformed Firefighters Ass'n, Local 94*, No. B-9-68 (Board of Collective Bargaining, Nov. 12, 1968), where the Board of Collective Bargaining defined the term "practical impact" as an "unreasonably excessive, or unduly burdensome workload, as a regular condition of employment." The board held that the existence of a practical impact is a question of fact to be determined by the board as a condition precedent to determining whether there are any bargainable issues arising out of the impact. *Id.* at 4-5. The board made the following conclusions: (1) Once the board determines that a practical impact exists, it will require the city expeditiously to relieve the impact. The city may relieve the impact on its own initiative through the exercise of its reserved management rights. If it cannot thus relieve the impact, however, or chooses to offer changes in wages, hours and working conditions as the means to alleviate impact, the city must bargain with the union concerning such matters and, if no agreement can be reached, submit

In *District Council 37 v. City of New York*,¹²⁶ the Board of Collective Bargaining faced a similar scope of bargaining question with respect to lay off procedures. Employees were notified that their employment would be terminated. While there were collective bargaining agreements in effect, they did not specifically address the manner in which lay offs due to budgetary factors were to be accomplished.¹²⁷ The union contended that the city's unilateral termination of employment resulted in a practical impact upon employees who, because layoffs were not made in inverse order of seniority and because other procedures relative to the manner in which lay offs would be effectuated were not applied, stood to lose jobs they otherwise would retain.¹²⁸ The city asserted as an affirmative defense that matters of layoff including the manner of implementation were outside the scope of collective bargaining.¹²⁹

In its decision, the board cited numerous private and public sector precedents holding that an employer may unilaterally decide to lay off employees for economic reasons, but that the effect of its decision on employees is a mandatory subject of bargaining.¹³⁰ Although the board dismissed the union's petition as premature, it did so without prejudice to the right of the union to initiate bargaining with respect to lay off impact issues.¹³¹ In the expectation that the union would

to mediation and/or impasse proceedings; (2) If the board determines that a practical impact exists and the city does not or cannot expeditiously relieve the impact, or the union alleges that the city has failed to alleviate the impact through the exercise of its reserved rights, the board will order an immediate hearing to determine whether the impact remains. If the board finds that a practical impact continues to exist, it shall order the city to bargain immediately with the union over the means to be used to relieve the impact, including, for this purpose, areas of reserved management rights. If the parties cannot agree, an impasse panel shall be appointed to make recommendations to alleviate the impact. *Id.*

126. No. B-18-75 (Board of Collective Bargaining, June 16, 1975).

127. *Id.*, slip op. at 2.

128. *Id.* at 2-3.

129. *Id.* at 3-4.

130. *Id.* at 14-23. In the private sector, *see, e.g.*, *NLRB v. Dixie Ohio Express Co.*, 409 F.2d 10 (6th Cir. 1969); *NLRB v. Thompson Transport Co.*, 406 F.2d 698 (10th Cir. 1969); *NLRB v. United Nuclear Corp.*, 381 F.2d 972 (10th Cir. 1967); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967); *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *NLRB v. Adams Dairy*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961). In the public sector, *see, e.g.*, *Albany Police Officers Union, Local 2841 v. City of Albany*, 7 N.Y. PUB. EMP. REL. BD. ¶ 3078 (1974); *Professional Fire Fighters Ass'n, Local 274 v. City of White Plains*, 5 N.Y. PUB. EMP. REL. BD. ¶ 3008 (1972); *New Rochelle Fed'n of Teachers v. City School Dist. of New Rochelle*, 4 N.Y. PUB. EMP. REL. BD. ¶ 3060 (1971).

131. No. B-18-75, slip op. at 37.

seek such bargaining in response to additional lay offs, however, the board resolved the legal issues raised by the petition, stating that: (1) impact issues such as notice of future intended layoffs, order of layoff, and order of recall of terminated employees are immediately bargainable upon demand; (2) the *per se* duty to bargain over lay off impact relates to employees either laid off or about to be laid off and not to the remaining employees; and (3) the duty to bargain on matters of practical impact can arise during the life of a contract.¹³² In a subsequent case,¹³³ which was challenged by the city and upheld by the Supreme Court, New York County,¹³⁴ the board reiterated its holding that the practical impact of lay offs is a mandatory subject of bargaining and ordered the city to negotiate with District Council 37 concerning lay offs necessitated by the fiscal crisis.

Although the fiscal crisis has made it more difficult for public employers to honor job security provisions in collective bargaining agreements, the New York Court of Appeals has held such provisions to be enforceable. In *Board of Education, Yonkers City School District v. Yonkers Federation of Teachers*,¹³⁵ the court required the board of education to submit to arbitration the issue of employee lay offs which were alleged to violate a job security clause in a collective bargaining agreement.¹³⁶ The issue before the court was whether a public employer is free to bargain about job security, a non-mandatory subject of bargaining, and submit disputes concerning job security to arbitration pursuant to the provisions of a collective bargaining agreement.¹³⁷ The court relied on its holding in an earlier case,¹³⁸ and declared that a contract provision guaranteeing employees job security for a reasonable period of time is not barred by statute,

132. *Id.* at 33-36.

133. *City of New York v. District Council 37*, No. B-21-75 (Board of Collective Bargaining, July 16, 1975).

134. *City of New York v. Board of Collective Bargaining*, N.Y.L.J., Mar. 18, 1976, at 7, col. 2 (Sup. Ct. N.Y. County).

135. 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976).

136. The Yonkers Board of Education and the teachers' union entered into a collective bargaining agreement in Nov., 1974 prior to the enactment of the Financial Emergency Act, containing the following job security clause: "During the life of this contract no person in this bargaining unit shall be terminated due to budgetary reasons or abolition of programs but only for unsatisfactory job performance as provided for under the Tenure Law." *Id.* at 272, 353 N.E.2d at 570, 386 N.Y.S.2d at 657.

137. *Id.* at 271, 353 N.E.2d at 570, 386 N.Y.S.2d at 658.

138. *Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n*, 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S. 2d 427 (1975). There the court of appeals held that parties may negotiate about non-mandatory subjects of bargaining and, if they do so, are bound by their agreements on such matters.

decisional law, or public policy.¹³⁹ The court therefore held that the Yonkers school board could negotiate voluntarily concerning job security, agree to arbitrate disputes, and having so agreed, be forced to arbitrate.¹⁴⁰

The court rejected the school board's argument that the Financial Emergency Act,¹⁴¹ which acknowledged that Yonkers was in a state of financial emergency, was a legislative expression of a public policy that permitted the abolition of jobs regardless of a contractual grant of job security.¹⁴² The court stated that the act evidenced no policy of abrogating collective bargaining agreements or of abolishing teaching positions.¹⁴³ Although the court acknowledged that not all collective bargaining agreements or all job security clauses are enforceable under all circumstances, and that saving a municipality from bankruptcy may require the impairment of contractual obligations, it concluded that "the collective bargaining agreement in question, negotiated before a legislatively declared emergency, short-term in length, and indistinguishable from the city's other contractual obligations which remain enforceable, is not yet vulnerable to attack as in violation of public policy."¹⁴⁴ Thus, the court drew a distinction between allowing the city to ignore its wage obligations,¹⁴⁵ which would result only in temporary monetary loss to employees, and allowing the city to ignore its promises of job security, the consequences of which would be far more drastic.

B. Reduction in Manning Levels

Reduction in the work force necessitated by the fiscal crisis was the subject of direct challenges by the PBA and the Uniformed Firefighters Association (UFA).¹⁴⁶ These unions objected to the city's announcements in 1975 of its intention to reduce levels of manning in the police and fire departments.

139. 40 N.Y.2d at 271, 353 N.E.2d at 570, 386 N.Y.S.2d at 658.

140. *Id.* at 272, 353 N.E.2d at 572, 386 N.Y.S.2d at 659.

141. Ch. 868 [1975] N.Y. Laws 1405 (McKinney). *See* notes 6-16 *supra* and accompanying text.

142. 40 N.Y.2d at 275, 353 N.E.2d at 573, 386 N.Y.S.2d at 660.

143. *Id.*

144. *Id.* at 276, 353 N.E.2d at 573, 386 N.Y.S.2d at 661.

145. *See* *Subway-Surface Supervisors' Ass'n v. New York City Transit Auth.*, 44 N.Y.2d 101, 375 N.E.2d 384, 404 N.Y.S.2d 323 (1978) (court upheld wage freeze provision of the FEA, allowing the city to ignore its pre-existing obligation to pay wage increases); *see* notes 33-39 *supra* and accompanying text.

146. *City of New York v. PBA*, No. B-5-75 (Board of Collective Bargaining, Feb. 14, 1975); *City of New York v. Uniformed Firefighters Ass'n, Local 84*, No. B-20-75 (Board of Collective Bargaining, July 16, 1975).

With respect to the police, the city requested a determination by the Board of Collective Bargaining as to whether its proposed withdrawal of a prior commitment to maintain "current policies" concerning the number of men assigned to precinct radio motor patrol cars was within the scope of collective bargaining.¹⁴⁷ The city asserted that it had the unilateral right to reduce the number of police officers in a patrol car from two to one, pursuant to the management rights clause of the NYCCBL.¹⁴⁸ In *City of New York v. Patrolmen's Benevolent Association*,¹⁴⁹ the board upheld this right, relying on the statutory provision that management has the right "to determine the standards of services to be offered by its agencies" and "the methods, means and personnel by which government operations are to be conducted."¹⁵⁰ The board noted, however, that the statute also provides that "questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining."¹⁵¹ The board found that the PBA's allegations that reductions in manning levels would adversely affect the safety of policemen were sufficient to order the city to bargain with the union to alleviate any practical impact before implementing the plan.¹⁵² After the issuance of the board's decision, the PBA and the city entered into negotiations concerning the proposed one-man patrol plan and ultimately agreed to submit the matter to an impasse panel for resolution. The panel found that there was no safety impact in the city's plan.¹⁵³ Because the panel's findings were not appealed to the Board of Collective Bargain-

147. The city also sought a determination as to whether its proposed withdrawal of the "24-squad system," under which police officers worked 8½ hour tours and had more days off per year, was a mandatory subject of bargaining. *City of New York v. PBA*, No. B-5-75, slip op. at 1-3.

148. See NEW YORK, N.Y., ADMIN. CODE ch. 54, § 1173-4.3b (1975).

149. No. B-5-75.

150. *Id.* slip op. at 12, citing NEW YORK, N.Y., ADMIN. CODE ch. 54, § 1173-4.3b (1975); see note 123 *supra*.

151. *Id.*

152. No. B-5-75, slip op. at 13-14. In determining that the presence of safety issues rendered the city's proposed reduction in manning bargainable, the Board of Collective Bargaining concurred with decisions of the New York State Public Employment Relations Board (PERB). See, e.g., *Albany Police Officers Union, Local 2841 v. City of Albany*, 7 N.Y. PUB. EMP. REV. BD. ¶ 3078 (1974) (demand for two men in patrol cars held bargainable as affecting safety); *Professional Fire Fighters Ass'n, Local 274 v. City of White Plains*, 5 N.Y. PUB. EMP. REV. BD. ¶ 3008 (1972) (demand for specified number of firemen on a fire truck held bargainable as related to safety).

153. *PBA v. City of New York*, No. I-130-77, slip op. at 16 (Office of Collective Bargaining, June 10, 1977) (Levin, Arb.).

ing, the award became final and binding¹⁵⁴ and the solo patrol car plan was implemented in stages beginning in 1977.¹⁵⁵

In *City of New York v. Uniformed Firefighters Association, Local 94*,¹⁵⁶ the board granted the UFA's request for arbitration of a grievance filed in response to the announced intention of the fire department to reduce manning below the minimum levels provided for in its 1973-74 collective bargaining agreement. This agreement was in effect pursuant to the status quo provisions of the NYCCBL.¹⁵⁷ The city argued that the manning level clause was nullified because the 1975-76 municipal budget reduced the funds available for fire department manpower.¹⁵⁸ The UFA argued that the city cannot "legislate away" a contractual obligation.¹⁵⁹ It cited a court of appeals decision to the effect that mere financial hardship, however burdensome, does not constitute grounds to excuse performance of a collective bargaining agreement.¹⁶⁰ The board agreed with the union, stating that while the city has the right to determine the level of services needed and what it can afford, it must honor the terms of an existing labor contract for the duration of that agreement.¹⁶¹ Since the applicable collective bargaining agreement dealt with the subject of manning, the board found that this was a proper subject for arbitration.¹⁶²

154. See NEW YORK, N.Y., ADMIN. CODE ch. 54, § 1173-7.0(c)(4)(a) (1975 & Supp. 1981-82). As originally enacted in 1967, New York, N.Y., [1967] N.Y. Local Laws 449-50 (No. 53), § 1173-7.0(c) of the NYCCBL contained provisions for fact-finding, but the recommendations that resulted were advisory only. Nevertheless, the City of New York maintained a policy of voluntary compliance with impasse panel recommendations. The system of final and binding impasse arbitration provided for in the current statute was enacted by the New York City Council in 1972. New York, N.Y., [1972] N.Y. Local Laws 158-160 (No. 2), *codified at* NEW YORK, N.Y., ADMIN. CODE ch. 54, §§ 1173-5.0(a)(8), -7.0(c)(3)(e), -7.0(c)(4), -7.0(f) (1975 & Supp. 1981-82).

155. See New York City Police Department, Operations Order No. 85, Oct. 27, 1977.

156. No. B-20-75 (Board of Collective Bargaining, July 16, 1975).

157. *Id.*, slip op. at 5. NEW YORK, N.Y., ADMIN. CODE ch. 54, § 1173-7.0(d) (1975), requires preservation of the status quo during a specifically delimited "period of negotiations."

158. No. B-20-75, slip op. at 2-3.

159. *Id.* at 4.

160. *Id.*, citing *PBA v. City of New York*, 59 Misc. 2d 556, 299 N.Y.S.2d 986 (Sup. Ct. N.Y. County), *aff'd*, 35 A.D.2d 697, 314 N.Y.S.2d 762 (1st Dep't 1970), *modified on other grounds and aff'd*, 27 N.Y.2d 410, 267 N.E.2d 259, 318 N.Y.S.2d 477 (1971).

161. No. B-20-75, slip op. at 8. *Cf. Yonkers Bd. of Educ. v. Yonkers Fed'n of Teachers*, 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976) (provisions of collectively negotiated labor agreement held to be enforceable in spite of the fiscal crisis); see notes 135-45 *supra* and accompanying text.

162. No. B-20-75, slip op. at 9.

The designated arbitrator in the Firefighters' dispute found that neither the lay offs nor the reductions in manning effectuated by the city violated the collective bargaining agreement, but that the city's right to reduce manning levels and to lay off personnel was "impliedly restricted by levels of safety to the public and the level of reasonable danger to the firemen."¹⁶³ Noting that lay offs and manning reductions had left the fire department "'wounded' but still effective," the arbitrator determined that the city had exhausted its rights to reduce personnel and manning levels to meet the fiscal crisis.¹⁶⁴ This award was modified, however, on appeal.¹⁶⁵

163. *Uniformed Firefighters Ass'n v. City of New York*, No. A-479-75, slip op. at 13 (Office of Collective Bargaining, Feb. 15, 1976) (Schmertz, Arb.). At the time of this controversy, the city had laid off 894 firefighters and had reduced the minimum number of men per tour of duty from five to four in 162 engine companies; from six to five in 29 ladder companies, in all squad companies, and in all rescue companies; and from ten to nine in three combination fire companies.

164. *Id.* at 13-14.

165. The City of New York filed a petition seeking to modify Arbitrator Schmertz's award on the ground that the arbitrator had exceeded his authority in directing that there be no further layoffs. The Supreme Court, New York County, agreed and granted the city's petition. *City of New York v. Uniformed Firefighters Ass'n, Local 94*, N.Y.L.J., Aug. 11, 1976, at 8, col. 2 (Sup. Ct. N.Y. County).

Other municipalities in New York State are required to bargain concerning the safety implications of reduced levels of manning. In *City of Mount Vernon v. Uniformed Firefighters Ass'n, Local 107*, 11 N.Y. PUB. EMP. REL. BD. ¶ 3049 (1978), the state PERB determined that a demand for the creation of a joint labor-management safety committee to cover "all matters of safety to the members of the Fire Department covered under this . . . Agreement, including but not limited to the total number of employees reporting to a fire and the minimum amount of employees to be assigned to each piece of fire fighting apparatus," was a mandatory subject of negotiation. *Id.* at 3076, 3077. Relying on its prior decision in *Uniformed Firefighters Ass'n v. City of New Rochelle*, 10 N.Y. PUB. EMP. REL. BD. ¶ 3078 (1977), *aff'd*, 11 N.Y. PUB. EMP. REL. BD. ¶ 7002 (2d Dep't 1978), PERB noted that, while the assignment of personnel and vehicles to a fire may primarily concern issues of manning, in a given factual situation, safety aspects may predominate. Therefore it found that, on a case-by-case basis, questions of manning may be properly submitted to a safety committee. 11 N.Y. PUB. EMP. REL. BD. ¶ 3049. *See also* *City of New Rochelle v. Crowley*, 11 N.Y. PUB. EMP. REL. BD. ¶ 7002 (2d Dep't 1978), *aff'g* 10 N.Y. PUB. EMP. REL. BD. ¶ 3078 (1977), and citing with approval three prior decisions of PERB: *City of Troy v. Troy Uniformed Firefighters Ass'n, Local 2304*, 10 N.Y. PUB. EMP. REL. BD. ¶ 3105 (1977); *City of Newburgh v. International Ass'n of Firefighters of Newburgh, Local 589*, 10 N.Y. PUB. EMP. REL. BD. ¶ 3001 (1977), *confirmed sub nom.* *International Ass'n of Firefighters v. Helsby*, 59 A.D.2d 342, 399 N.Y.S.2d 344 (3d Dep't 1977); *City of White Plains v. White Plains PBA*, 9 N.Y. PUB. EMP. REL. BD. ¶ 3007 (1976). According to the appellate division, these cases demonstrated that PERB had struck an "eminently reasonable balance" between the conflicting considerations of management's right not to negotiate general questions of manpower and a union's right to negotiate the formation of a committee to consider specific safety considerations. 11 N.Y. PUB. EMP. REL. BD. ¶ 7002.

After two years of assigning one man patrols to rank-and-file officers, the New York City Police Department instituted a program providing for solo supervisory patrols by sergeants and lieutenants.¹⁶⁶ The Sergeants' Benevolent Association initiated improper practice and grievance proceedings with the Board of Collective Bargaining and, although the institution of the program was upheld as within the city's management rights, the board found the program to have a practical impact upon the safety of sergeants and lieutenants.¹⁶⁷ Therefore, the board ordered the parties to bargain concerning the safety issue.¹⁶⁸ When the parties could not reach an agreement, an impasse panel was appointed. Noting that it had the difficult task of "drawing lines which will provide the maximum possible safety for the employees while preserving to the fullest extent possible the city's statutory managerial right,"¹⁶⁹ the panel recommended safeguards to alleviate the safety impact,¹⁷⁰ concluding that the supervisory patrol was no less dangerous than the solo patrols for rank-and-file officers.¹⁷¹ Thus, although the city has a right to reduce manning levels unilaterally,

166. *Sergeants' Benevolent Ass'n v. City of New York*, No. B-6-79, slip op. at 1-2 (Board of Collective Bargaining, May 24, 1979), *aff'd sub nom. Sergeants' Benevolent Ass'n v. Board of Collective Bargaining*, N.Y.L.J., Aug. 21, 1979, at 6, col. 2. (Sup. Ct. N.Y. County).

167. Shortly after the Sergeants' Benevolent Association filed its petition, the Lieutenants' Benevolent Association intervened as a party. The board found that the city's plan for supervisory solo patrols, unlike the plan for patrols by rank-and-file officers, did not provide adequately for officer safety. No. B-6-79, slip op. at 22-23, 30.

168. *Id.* at 30.

169. *Sergeants' Benevolent Ass'n v. City of New York*, No. I-145-79, slip op. at 20 (Office of Collective Bargaining, Oct. 3, 1980) (Feldblum, Zack, Collins, Arbs.).

170. These included:

1. the establishment of a "trigger point" of two-man patrol cars which must be met for a precinct and tour before solo supervisory patrols may be assigned;
2. the provision by the City of portable radios and shotguns, with adequate training in the use of the latter as a condition precedent to assignment to a solo patrol;
3. voluntary assignments to precede involuntary ones;
4. the use of solo patrol supervisors only as back-up units in emergencies when no other back-up car is available;
5. the provision of drivers for supervisors who are unfamiliar with the area they are assigned to patrol, for supervisors who are assigned to more than one precinct; and for any supervisor on a given tour in the event of an "unusual condition"; and
6. the requirement that the parties establish a joint Labor-Management Committee on Safety.

Id. at 23-24.

171. *Id.*

bargaining may be required where there is a practical impact on safety.

C. Adoption of Innovative Management Concepts

1. Broadbanding

Broadbanding, which involves the consolidation of related job titles into a single title, first was implemented in the city in 1977.¹⁷² A broadbanded title typically consists of three assignment levels, each of which corresponds to a predecessor title included in the new title. For example, the former clerical titles of Administrative Assistant, Administrative Associate, and Senior Administrative Assistant were consolidated into the new title of Principal Administrative Associate which has three assignment levels.¹⁷³ An employee whose title is broadbanded may choose to remain in his old title or may take a reclassification examination which, while not an examination for promotion, will qualify him to assume the duties of any level of responsibility within the new title.¹⁷⁴

The advantage of broadbanding, from the employer's viewpoint, is the flexibility afforded in assigning personnel. An employee generally enters a broadbanded title at the level which corresponds to his former civil service title and salary rate. The employer may assign such an employee to a higher level without giving him an examination and subsequently return him to the level of entry without showing that the employee's performance was unsatisfactory.¹⁷⁵ In the face of a severely reduced workforce, the ability to assign employees to positions in which they are needed at a given time, without the obligation of continuing the assignment and higher salary rate when the need has been fulfilled, allows for better management. Indeed, according to the city, broadbanding has improved its delivery of services.¹⁷⁶

172. Prial, *Broadbanding Still an Issue*, Chief-Leader, July 31, 1981, at 4, col. 3.

173. Resolution 77-43 of the New York City Personnel Director, adopted Nov. 9, 1977.

174. In the case of an employee whose title, prior to broadbanding, is equivalent to the highest level of the broadbanded title, no examination is required. Reclassification to the new title is automatic. *See, e.g.*, Resolution 78-29 of the New York City Personnel Director, adopted July 12, 1978 (automatically reclassifying employees in three parking meter and traffic control positions without requiring a new examination).

175. Note that the civil service law requirements that appointments be made by selecting one of the three persons who are at the top of an eligibility list for a given title established through competitive examination, N.Y. CIV. SERV. LAW § 61(1) (McKinney 1973), and that persons holding such appointments may not be removed except upon a showing of incompetency or misconduct, N.Y. CIV. SERV. LAW § 75(1) (McKinney 1973), are avoided in the broadbanding scheme.

176. Prial, *Broadbanding Still an Issue*, Chief-Leader, July 31, 1981, at 4, col. 3.

From the employee's viewpoint, broadbanding is desirable because it increases promotional opportunities by eliminating many of the examinations normally required to reach the highest rungs of a career ladder. However, with the exception of those unions which have negotiated economic gains in return for their support of broadbanding programs,¹⁷⁷ the response of the city's unions generally has been negative. One of the objections to broadbanding raised by municipal unions is that an employee who is assigned to a higher level of a broadbanded title subsequently may be reassigned to the level equivalent to his former civil service title at the discretion of the employer. The Communications Workers of America, Local 1180 and District Council 37, Local 2627 sought, through collective bargaining, to protect the employees they represented in several broadbanded administrative and data processing titles. When they failed to reach agreements with the city,¹⁷⁸ the disputes were submitted to an impasse panel.¹⁷⁹ The recommendations of the panel, which were accepted by the parties, provided a degree of salary protection for employees at the higher levels of broadbanded titles.¹⁸⁰

177. District Council 37, for example, has struck such a bargain. *Id.*

178. Initially, the City of New York charged that the Communications Workers' demand was outside the scope of mandatory negotiations since it would impact on the city's right to assign employees within a broadbanded title to different duties. The Board of Collective Bargaining determined this scope of bargaining question in *City of New York v. Local 1180, Communications Workers of America*, No. B-19-79 (Board of Collective Bargaining, Nov. 16, 1979), in which it held that a demand for salary protection concerns wages and is a mandatory subject, even though the demand impacts on management's right to make assignments within titles.

179. Nos. I-144-79/I-151-79 (Office of Collective Bargaining, June 24, 1980) (Glushien, Arb.).

180. The impasse panel recommended that:

1. Employees who have served for three years and three months at an assignment level above the lowest assignment level of a broadbanded title may only be reduced in salary based upon their last performance evaluation, . . . provided such overall performance evaluation rating is unsatisfactory. . . .
2. Where an employee's salary has been reduced pursuant to paragraph 1, the Union may claim that the evaluation upon which it is based is improper or incorrect and appeal such claim under the grievance procedure of the Agreement. The Union shall have the burden of showing the arbitrator that the evaluation was improper or incorrect.
3. The salary rate of an employee reassigned to a lower assignment level in a broadbanded title whose salary rate is reduced shall receive the rate such employee would have been receiving had the employee served continuously in the lower assignment level.

Id., slip op. at 12-13. The protections afforded by the impasse panel award apply only to employees in the titles covered by the award. By order of the Mayor, however, the salary protection for employees who have served three years and three

Despite the implementation of the broadbanding concept in city government, a question still remains as to its legality. Only a few court actions have been brought challenging the concept, however. In *Basoa v. Department of Corrections*,¹⁸¹ a state supreme court justice summarily upheld the city's power to consolidate civil service titles, finding that the power to grade and establish classes or positions granted to the city personnel director by the New York City Charter¹⁸² is accompanied by the power to reclassify those positions.¹⁸³ The court stated further that it did not appear that the consolidation of titles would result in promotions without competitive examination or that appointments pursuant to the consolidation would not be based on merit and fitness.¹⁸⁴

In *Local 1508, Uniformed Park Officers v. City of New York*,¹⁸⁵ a more comprehensive decision was rendered, but one which still did not decide the legality of the particular reclassification. The Supreme Court, New York County, found that the New York City Director of Personnel had authority to broadband and consolidate positions pursuant to section 52 of the Civil Service Law.¹⁸⁶ It explained, how-

months in a level of a broadbanded title higher than the entry level now applies to most city employees. See *Alternative Career and Salary Pay Plan Regulations*, Office of the Mayor, The City of New York, Labor Relations Order 81/1, ¶ X (Aug. 12, 1980).

181. Index No. 07396/79 (Sup. Ct. N.Y. County 1979), *appeal dismissed*, M-1508 (1st Dep't May 12, 1981).

182. N.Y.C. CHARTER ch. 35, § 813(a)(2) (1976).

183. Index No. 07396/79, slip op. at 2, *citing* *Green v. Lang*, 18 N.Y.2d 437, 223 N.E.2d 19, 276 N.Y.S.2d 604 (1966) (city's reclassification of civil servants upheld on grounds that administrative officers have power to assign duties and fix salaries within a class achieved by competitive examination).

184. Index No. 07396/79, slip op. at 1; *accord* *Seelig v. Department of Personnel*, Index No. 05637/80 (Sup. Ct. N.Y. County 1980), *aff'd*, N.Y.L.J., Dec. 3, 1981, at 5, col. 1 (1st Dep't). Moreover, the *Basoa* court noted that although appointments to a title are permanent, assignments within a given title are mere "horizontal movements." Index No. 07396/79, slip op. at 2.

185. N.Y.L.J., Dec. 28, 1979, at 5, col. 2 (Sup. Ct. N.Y. County).

186. *Id.* N.Y. CIV. SERV. LAW § 52(1) (McKinney 1973), entitled "Promotion examinations" provides:

Filling vacancies by promotion. Except as provided in section fifty-one, vacancies in positions in the competitive class shall be filled, as far as practicable, by promotion from among persons holding competitive class positions in a lower grade in the department in which the vacancy exists, provided that such lower grade positions are in direct line of promotion, as determined by the state civil service department or municipal commission; except that where the state civil service department or a municipal commission determines that it is impracticable or against the public interest to limit eligibility for promotion to persons holding lower grade positions in direct line of promotion, such department or commission may extend eligibility for promotion to persons holding competitive

ever, that if the reclassification was in fact a reorganization, such that the newly created positions included new duties as well as old ones, the resultant vacancies could be filled only by promotional examination.¹⁸⁷ Since the record before the court did not enable it to determine whether the reclassification in fact resulted in the assignment of new duties or conferred superior supervisory status by way of higher title and salary, a plenary trial was ordered.¹⁸⁸

The most recent case addressing the legality of broadbanding concerned the consolidation of various warden titles in the Department of Corrections. In *Lenihan v. City of New York*,¹⁸⁹ the Supreme Court, New York County, held that the particular broadbanding in dispute was lawful, on the grounds expressed in *Basoa*.¹⁹⁰ There remained, however, the issue of the legality of the reclassification examination, an oral examination conducted over a two-day period which all competitors passed, and which the plaintiffs alleged was not a competitive exam as required by law.¹⁹¹ The appellate division, noting that oral examinations may be given in appropriate circumstances, modified the decision and held that the plaintiffs had failed to prove that the exam was not competitive.¹⁹²

2. *Civilianization*

The "civilianization" program involves the replacement of uniformed employees in the departments of police, fire and corrections with civilians in positions which do not specifically require the expertise of uniformed officers, and the reassignment of uniformed personnel to more "professional" duties. Civilianization, while not a new concept in New York City, has been implemented much more extensively since the fiscal crisis. This program has resulted in financial savings to the city and the improved delivery of essential services because civilians are paid lower salaries than the uniformed personnel they replace while the uniformed personnel are made available for the

class positions in lower grades which the department or commission determines to be in related or collateral lines of promotion, or in any comparable positions in any other unit or units of governmental service and may prescribe minimum training and experience qualifications for eligibility for such promotion.

Id.

187. N.Y.L.J., Dec. 28, 1979, at 5, col. 2 (Sup. Ct. N.Y. County).

188. *Id.*

189. Index No. 22313/80 (Sup. Ct. N.Y. County 1981), *modified and aff'd*, Index No. 12176 (1st Dep't Dec. 17, 1981).

190. *Id.*, slip op. at 4. See notes 181-84 *supra* and accompanying text.

191. Index No. 22313/80, slip op. at 2.

192. Index No. 12176, slip op. at 9 (1st Dep't Dec. 17, 1981).

more critical positions. In addition to filling clerical positions, civilians serve, for example, as traffic enforcement agents,¹⁹³ tow truck operators,¹⁹⁴ and telephone operators and radio dispatchers.¹⁹⁵ In the New York City Police Department, nearly twenty percent of the employees are now civilians.¹⁹⁶

Civilianization has given rise to work jurisdiction claims by some of the uniformed services unions—claims that the tasks being assigned to civilians “belong” to the police officers’ union or to the firefighters’ union. The program has been challenged in a series of cases before the Board of Collective Bargaining, the Public Employment Relations Board, and the courts. The Board of Collective Bargaining, in six separate decisions, dismissed seventeen improper practice petitions filed by the PBA,¹⁹⁷ the union representing police officers in New York City. In these petitions, the PBA alleged that the use of civilians to operate police radio patrol cars;¹⁹⁸ issue parking summonses;¹⁹⁹ replace police personnel in the Management Information Services Division;²⁰⁰ perform clerical, record keeping, time keeping, roll call, payroll, communications, statistical, analytical, and mechanical repair functions;²⁰¹ replace a supervisory sergeant;²⁰² patrol the highways and perform other functions relating to the enforcement of motor vehicle laws²⁰³ constituted improper employer practices under the NYCCBL.²⁰⁴

193. See *PBA v. McGuire*, No. B-8-80 (Board of Collective Bargaining, Mar. 20, 1980), *aff'd*, N.Y.L.J., Apr. 21, 1981, at 7, col. 1 (Sup. Ct. N.Y. County).

194. *Id.*

195. See *PBA v. McGuire*, No. B-26-80 (Board of Collective Bargaining, July 23, 1980), *aff'd*, Index No. 16971/80 (Sup. Ct. N.Y. County July 26, 1981).

196. City of New York, *Productivity Program for New York City* submitted to Financial Control Board, at 5 (Sept. 17, 1980); *The Mayor's Management Report* submitted to the Board of Estimate and the City Council, at 48 (Sept. 17, 1981).

197. The Board of Collective Bargaining also dismissed a request for arbitration of a grievance involving the use of a civilian to supervise uniformed personnel in the Office of Manhattan Property Clerk. *City of New York v. PBA*, No. B-28-80 (Board of Collective Bargaining, Sept. 4, 1980).

198. *PBA v. City of New York*, No. B-5-80 (Board of Collective Bargaining, Mar. 20, 1980).

199. *PBA v. McGuire*, No. B-8-80 (Board of Collective Bargaining, Mar. 20, 1980), *aff'd*, N.Y.L.J., Apr. 21, 1981, at 7, col. 1 (Sup. Ct. N.Y. County).

200. *DeMilia v. McGuire*, No. B-14-80 (Board of Collective Bargaining, May 20, 1980).

201. *PBA v. McGuire*, No. B-26-80 (Board of Collective Bargaining, July 23, 1980), *aff'd*, Index No. 16971/80 (Sup. Ct. N.Y. County July 26, 1981).

202. *PBA v. McGuire*, No. B-27-80 (Board of Collective Bargaining, July 23, 1980), *aff'd*, Index No. 16972/80 (Sup. Ct. N.Y. County July 26, 1981).

203. *PBA v. McGuire*, No. B-33-80 (Board of Collective Bargaining, Sept. 11, 1980), *aff'd*, N.Y.L.J., Jan. 30, 1981, at 6, col. 1 (Sup. Ct. N.Y. County).

204. Section 1173-4.2a of the NYCCBL provides that:

It shall be an improper practice for a public employer or its agents:

The board found that the civilianization programs challenged were not improper employer practices and specifically did not constitute employee discrimination for the purpose of encouraging or discouraging membership in the union in violation of the NYCCBL.²⁰⁵ In addition, the board noted that the PBA consistently failed to demonstrate that the replacement of police officers by civilians was detrimental to the PBA or that the bargaining unit for which the PBA is the certified collective bargaining representative had been changed or reduced in any way by the transfer of duties from uniformed to civilian personnel.²⁰⁶ The board also held that the city has no duty to bargain over the reassignment of duties to civilians because such reassignment is a matter of management prerogative.²⁰⁷

The city's right to take unilateral action in areas of defined management prerogative is not unlimited. NYCCBL section 1173-4.3b, the statutory management rights clause, upon which the board relied in its decisions, requires the city to bargain concerning the practical impact that managerial decisions have on employees.²⁰⁸ Although the PBA, in the above-mentioned cases, alleged that the civilianization program had a practical impact upon its members,²⁰⁹ the board found no evidence to support those allegations, and held that no issues were presented which gave rise to a duty to bargain on the part of the

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

NEW YORK, N.Y., ADMIN. CODE ch. 54 (1975).

205. *PBA v. McGuire*, No. B-26-80, slip op. at 13 (Board of Collective Bargaining, Sept. 4, 1980).

206. *Id.*, slip op. at 12.

207. *Id.* NEW YORK, N.Y., ADMIN. CODE ch. 54, § 1173-4.3b (1975), confers upon the city the unilateral right to determine "the methods, means and personnel by which government operations are to be conducted," and to "maintain the efficiency of governmental operations." See note 123 *supra*. As the city asserted in *PBA v. McGuire*, the Police Department, through its ongoing civilianization program, "[i]s attempting to deploy its total workforce in a fashion most conducive to effective, efficient and safe delivery of police functions.'" No. B-26-80, slip op. at 17.

208. NEW YORK, N.Y., ADMIN. CODE ch. 54, § 1173-4.3b; see notes 123 and 125 *supra* and text accompanying notes 125-34 *supra*.

209. The union also relied heavily on the decision of the United States Supreme Court in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), on the subject of subcontracting, drawing an analogy between the assignment of police

city.²¹⁰ When the PBA initiated article 78 proceedings²¹¹ seeking to overturn four of the board's decisions in the civilianization cases, the Supreme Court, New York County, consistently upheld the board's determinations, finding that the board's construction of the NYCCBL was rationally based.²¹²

The Board of Collective Bargaining decisions in the area of civilianization are consistent with relevant decisions of the state PERB. In *County of Suffolk v. Suffolk County Patrolmen's Benevolent Association, Inc.*,²¹³ for example, PERB held that the transfer of police officers from the teletype, firearms and central records sections to other units within the County Police Department, and the replacement of those police officers with civilian employees, was within the county's management prerogative. PERB affirmed the decision of its hearing officer who found that the county's decision to civilianize was not a mandatory subject of bargaining because: (1) police officers were neither terminated nor laid off; (2) police officers suffered no reduction in salary or benefits; (3) the total number of employees

officer duties to civilians and the contracting out of bargaining unit work to non-bargaining unit independent contractors. However, the Board of Collective Bargaining distinguished *Fibreboard*, which held that the employer's decision to subcontract maintenance work was a mandatory subject of bargaining. Not only was there no management rights clause at issue in the *Fibreboard* case, but there was no showing that bargaining unit members would be terminated as was the case in *Fibreboard*. PBA v. McGuire, No. B-26-80, slip op. at 17-21. Further, the PBA cases involved a transfer of function from one group of employees to another within the same city agency, see No. B-26-80 (transfer of functions from police officers to civilians within various precincts and units of Police Department), or from one agency to another, see PBA v. McGuire, No. B-8-80 (Board of Collective Bargaining, Mar. 20, 1980) (transfer of ticketing and towing functions from Parking Enforcement Squad of Police Department to Department of Traffic); PBA v. McGuire, No. B-33-80 (Board of Collective Bargaining, Sept. 11, 1980) (transfer of functions, including enforcement of motor vehicle laws from Traffic Division of Police Department to Department of Traffic), rather than the subcontracting of an entire operation to a non-city employer.

210. See, e.g., PBA v. McGuire, No. B-33-80, slip op. at 11-12, 19 (Board of Collective Bargaining, Sept. 11, 1980).

211. N.Y. CIV. PRAC. LAW §§ 7801-7806 (McKinney 1981), provides the vehicle for obtaining judicial review of decisions of administrative bodies, including those of the Board of Collective Bargaining.

212. *In re* PBA, N.Y.L.J., Apr. 21, 1981, at 7, col. 1 (Sup. Ct. N.Y. County), *aff'g* PBA v. McGuire, No. B-8-80 (Board of Collective Bargaining, Mar. 20, 1980); PBA v. McGuire, Index Nos. 16971/80 and 16972/80 (Sup. Ct. N.Y. County 1981), *aff'g* PBA v. McGuire, No. B-26-80 (Board of Collective Bargaining, July 23, 1980) and PBA v. McGuire, No. B-27-80 (Board of Collective Bargaining, July 23, 1980); *In re* PBA, N.Y.L.J., Jan. 30, 1981, at 6, col. 1 (Sup. Ct. N.Y. County), *aff'g* PBA v. McGuire, No. B-33-80 (Board of Collective Bargaining, Sept. 11, 1980).

213. 12 N.Y. PUB. EMP. REL. BD. ¶ 3123 (1979), *appeal dismissed*, 13 N.Y. PUB. EMP. REL. BD. ¶ 7007 (1980).

within the Suffolk PBA's negotiating unit was unchanged; (4) the positions in question were clerical or instructive, rather than law enforcement in nature; and (5) the Police Department had determined that satisfaction of rigid qualifications for employment as a police officer was not necessary for filling these positions.²¹⁴

A more recent case, *City of Albany v. Albany Police Officers' Union*,²¹⁵ involved allegations by the union that the City of Albany had violated its obligation to negotiate in good faith by unilaterally transferring nineteen police officers from work involving communications, towing and the issuance of parking tickets and hiring civilians to perform this work. PERB affirmed the hearing officer's decision²¹⁶ that there was no violation of the statutory duty to bargain because the reassignments were motivated only by a desire to utilize police officers more efficiently and by a determination that employees who could be given such responsibilities did not have to meet the requirements for appointment as police officers. Noting that the determination of job qualifications is a well-established management right, and that the record was devoid of allegations of a practical impact on the terms and conditions of employment of police officers, PERB dismissed the complaint.²¹⁷

The PERB decisions as well as those of the Board of Collective Bargaining recognize that government must be free to act unilaterally in certain areas in order to provide the best possible services to its citizens at the lowest possible cost. This is especially true in a time of fiscal constraint. It is clear, however, from the decisions of both agencies, that if a practical impact on the working conditions of bargaining unit members results from management's decision, the employer will be ordered to bargain concerning the alleviation of this impact.

Currently pending in Supreme Court, New York County, is a case in which the Lieutenants' Benevolent Association has challenged New York City's civilianization program as a violation of the New York State Constitution and the Civil Service Law, rather than as an improper labor practice under the NYCCBL.²¹⁸ The plaintiffs in the action seek to enjoin the city from appointing civilians, or any individ-

214. 12 N.Y. PUB. EMP. REL. BD. ¶ 4561, at 4625-26 (Hearing Off. 1979).

215. 13 N.Y. PUB. EMP. REL. BD. ¶ 3011 (1980).

216. 12 N.Y. PUB. EMP. REL. BD. ¶ 4563 (Hearing Off. 1979).

217. 13 N.Y. PUB. EMP. REL. BD. ¶ 3011 (1980).

218. *Gebhardt v. City of New York*, No. 4188/81 (Sup. Ct. N.Y. County, filed Feb. 13, 1981).

ual other than a lieutenant,²¹⁹ to several enumerated positions in the New York City Police Department.²²⁰ The union contends that lieutenants previously assigned to these positions were assigned on the basis of promotional examination and that their replacement by persons not so examined violates the New York State Constitution²²¹ and the State Civil Service Law.²²² A motion to dismiss the action for lack of subject matter jurisdiction was denied.²²³ Thus, a ruling by the Supreme Court, New York County can be anticipated in this novel form of challenge to the civilianization concept.

IV. Conclusion

Although collective bargaining has been considered by some to be a cause of the New York City fiscal crisis, there is abundant evidence that bargaining has contributed to the ongoing solution of the problem. The major lesson to be learned is that collective bargaining works in adversity as well as in prosperity. It is an adaptable process which has accommodated the substantive and structural changes necessi-

219. According to the Lieutenants' Benevolent Association, Detective Lieutenants in command of precinct detective units have been replaced by police sergeants. This replacement, like the replacement by civilians, is alleged to violate Article V of the New York State Constitution and § 61 of the New York Civil Service Law. Summons and Verified Complaint at 11-12, *Gebhardt v. City of New York*, No. 4188/81 (Sup. Ct. N.Y. County, filed Feb. 13, 1981). See notes 221-22 *infra*.

220. These positions are: Administrative Lieutenant in the 50th Precinct, Lieutenant in the Identification Section of the Police Department, Lieutenant assigned to the Office of the Deputy Commissioner for Community Affairs, Detective Lieutenant in the Borough of Queens Detective Area, Detective Lieutenant in command of precinct detective units, and Director of Employee Services. Summons and Verified Complaint, *Gebhardt v. City of New York*, No. 4188/81.

221. N.Y. CONST. art. V, § 6. This section provides in pertinent part: "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive. . . ." *Id.*

222. N.Y. CIV. SERV. LAW § 61(2) (McKinney 1973) provides:

No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder. No credit shall be granted in a promotion examination for out-of-title work.

Id.

223. *Gebhardt v. City of New York*, No. 4188/81 (Sup. Ct. N.Y. County June 15, 1981).

tated by the fiscal crisis and survived. But the bargaining process has not merely survived—it has become a critical factor in the city's fiscal survival and continuing recovery.

Collective bargaining has facilitated the implementation of cost-saving measures in an atmosphere of cooperation between the city and the unions. When the city could not afford to pay a negotiated wage increase, most municipal unions agreed to a deferral of the increases. The unions also agreed to a number of "givebacks" to aid in the city's response to the crisis. Among these were an agreement not to oppose the expiration of state legislation requiring the city to pay one-half of the pension contributions of its employees and an agreement to forego previously negotiated fringe benefits.

As a result of the fiscal crisis, there has been increased participation by labor unions in the governmental process. Even in areas of acknowledged management prerogative, management and labor have both had a role in the determination of certain aspects of the employment relationship. Examples of this are the one-man patrols for police officers and sergeants and two-man sanitation trucks which have been introduced as a more efficient use of manpower.

The process of collective bargaining in a time of fiscal constraint also has made municipal unions more aware of how government functions. Labor organizations now realize that they cannot be indifferent to the city's financial plight. Increasingly, unions have accepted a degree of responsibility for the city's fiscal survival by holding themselves accountable for the cost-effective delivery of public services.

Participation by labor in the affairs of government is not new, however. Union support traditionally has been solicited in order to gain legislative approval of budgets and other measures affecting city government. What is new is the degree of cooperation that the city and the municipal unions have achieved as a result of the fiscal crisis. Whether the current level of cooperation will evolve into a continuing policy of codetermination is uncertain. For the present, it remains in the public interest that the city and the unions be willing to solve common problems through constructive collective bargaining.