

<b>Matter of City of New York v Law Enforcement Empl. Benevolent Assoc.</b>
2013 NY Slip Op 33779(U)
July 23, 2013
Supreme Court, New York County
Docket Number: 154223/12
Judge: Joan A. Madden
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon Joan A. Middle  
Justice

PART 11

Index Number : 154223/2012  
IN THE MATTER OF APPLICATION  
vs.  
LAW ENFORCEMENT EMPLOYEES  
SEQUENCE NUMBER : 001  
VACATE OR MODIFY AWARD

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the  
attached Memorandum Decision and Order.

**U N F I L E D J U D G M E N T**  
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):  
12 154223

Dated: July 23, 2013

[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

-----X  
In the Matter of the Application of

THE CITY OF NEW YORK, THE NEW YORK CITY  
MAYOR'S OFFICE OF LABOR RELATIONS; and  
JAMES F. HANLEY, as Commissioner of The  
New York City Mayor's Office of Labor  
Relations,

Petitioners,

For a Judgment and Order Pursuant to  
Articles 75 and 78 of the Civil Practice  
Law and Rules

Index No. 154223/12

-against-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT  
ASSOCIATION; KENNETH N. WYNDER, JR.,  
President of the LAW ENFORCEMENT  
EMPLOYEES BENEVOLENT ASSOCIATION,  
THE NEW YORK CITY OFFICE OF COLLECTIVE  
BARGAINING, and MARLENE A. GOLD, as  
Chair of the NEW YORK CITY BOARD OF  
COLLECTIVE BARGAINING,

Respondents.

-----X

JOAN A. MADDEN, J.:

Motion sequence numbers 001 and 002 are consolidated for  
disposition.

This is a special proceeding for a judgment, pursuant to  
Articles 75 and 78 of the CPLR, to vacate arbitration awards  
dated May 29, 2012<sup>1</sup> (the First Award) and September 4, 2012<sup>2</sup> (the  
Second Award) of the New York City Board of Collective Bargaining

12 154223

<sup>1</sup> LEEBA, 5 OCB2d 18 (BCB 2012).

<sup>2</sup> LEEBA, 5 OCB2d 29 (BCB 2012).

(BCB).

In motion sequence number 001, petitioners The City of New York, the New York City Mayor's Office of Labor Relations, and James F. Hanley, as Commissioner of the New York City Mayor's Office of Labor Relations (collectively, the City), move for a judgment granting their petition to vacate the First Award. Respondents the New York City Office of Collective Bargaining (OCB) and Marlene A. Gold, as the Chair of the BCB, cross-move, pursuant to Article 78 of the CPLR, for an order dismissing the City's petition. Respondent Law Enforcement Employees Benevolent Association (LEEBA) cross-petitions, pursuant to Articles 75 and 78 of the CPLR, to modify the First Award of the BCB.

In motion sequence number 002, the City moves, pursuant to Articles 75 and 78, for judgment on their Amended/Supplemented Verified Petition to vacate both the First and Second Awards of the BCB.

LEEBA cross-moves to dismiss the City's Amended/Supplemented Petition and, on its Amended/Supplemented Verified Petition, for a judgment modifying and amending the Second Award of the BCB.

#### BACKGROUND

This proceeding arises from a series of decisions regarding the terms and conditions of employment for Levels I, II, and III of the title of Environmental Police Officer (EPO) of the New York City Department of Environmental Protection (DEP). The

title of EPO was created on February 16, 2000 by amendment to the City's Classified Service by the Department of Citywide Administrative Services (DCAS), which abolished existing job titles of Special Officer (Aqueduct Patrol) and Associate Special Officer (Aqueduct Patrol). The new title was exempted from the Career and Salary Plan and placed in the Miscellaneous Service classification under Rule X of the City's Personnel Rules and Regulations. EPOs, whose main responsibility is to protect the City's water supply, waterworks, and aqueducts, and to enforce the City's Watershed Rules and Regulations and other laws, are defined as police officers under section 1.20 (34) (o) of the New York Criminal Procedure Law (CPL).

At the time the EPOs were reclassified, they were represented by Local 300 of the Service Employees International Union (Local 300). Local 300 entered into a Supplemental Agreement with the City on behalf of the newly classified EPOs, which substantially modified the 1995-1999 Assistant Buyers Agreement, which previously covered them.

In October 2005, the Board of Certification of the OCB, certified LEEBA to represent the EPOs, and labor negotiations with the City for a collective bargaining agreement began. No agreement was reached, and on November 9, 2009, LEEBA filed a request for the appointment of an impasse panel (Impasse Request). OCB brought LEEBA and the City together for two

mediation sessions in January 2010, and on January 25, 2010, an impasse was declared.

On March 17, 2010, Alan R. Viani (Viani) was designated to serve as chair of an Impasse Panel, to hear and decide the terms and conditions of employment for the EPOs. Hearings were held on October 20, October 28, November 1, November 3 and December 6, 2010 and January 26, January 31, February 7, March 17, and May 12, 2011.

In order to determine the terms and conditions of employment, the Impasse Panel must consider the following factors:

- "(i) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York City or comparable communities;
- (ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;
- (iii) changes in the average consumer prices for goods and services, commonly known as the cost of living;
- (iv) the interest and welfare of the public;
- (v) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings."

New York City Collective Bargaining Law (NYCCBL), NYC Code § 12-311 (c) (3) (b).

During the proceedings, LEEBA argued that, even if they were not entitled to the same labor agreement as members of the New York City Police Department (NYPD), as police officers whose job qualifications and duties were substantially similar to those of the members of the NYPD, the EPOs were entitled to the City's "uniformed forces pattern of settlement," rather than being treated like civilian employees.

The City argued that LEEBA's position should be rejected because the EPOs' demands must be considered in the context of all other municipal employees, that the historic assignment of bargaining units to particular groups must be maintained for stability of labor relations, and because the EPOs had previously consented to a civilian settlement, they must continue to do so. The City argued that if the EPOs were treated similarly to the members of the NYPD, other bargaining units that had similarities to the EPOs might make similar demands.

In a 26-page decision, issued on January 14, 2012, referring in detail to the testimony, documents and briefs submitted by the parties, the Impasse Panel rejected the City's arguments that there had been no changes since the EPO title was created, that the parties had previously agreed to settlements conforming to the civil, rather than the uniformed forces pattern of settlement, and that the essential duties and responsibilities of the EPOs had not changed in any material way for decades. The

Impasse Panel noted that when the Board of Certification certified LEEBA as the EPOs' bargaining representative in 2005, it recognized that significant changes had occurred with respect to the job title, particularly after September 11, 2001, and that it was no longer appropriate for the job title to be part of a civilian bargaining unit. The Impasse Panel considered that the EPOs actual work had changed, that its job functions were not limited to protecting the City's water supply, and that they are defined as police officers under the Criminal Procedure Law (CPL § 1.20 [34]), with full police powers and authority to enforce New York State laws. See *People v Van Buren*, 4 NY3d 640 (2005) (EPOs have the authority to enforce Vehicle and Traffic Laws within the City watershed area). The Impasse Panel also noted that both terms of employment of EPOs (such as requiring drug testing and attendance at a police academy) and their law enforcement responsibilities had changed since 9/11, including more counter-terrorism related coordination with the FBI and other law enforcement agencies, more involvement in arrests and the issuance of summonses, and use of weapons similar to those of the NYPD including gas masks, riot helmets, riot suits, high caliber ammunition, sniper rifles, and Glock handguns. The Impasse Panel also noted that EPOs regularly work alongside other law enforcement officers and provide assistance while waiting for other law enforcement units, for example, supplementing the NYPD

to cover protests during the Republican National Convention in 2004. Finally, the Impasse Panel quoted the conclusion of the Board of Certification when it certified LEEPA as the bargaining representative for the EPOs, that their "exclusive or primary characteristic is law enforcement." *In the Matter of the Impasse between LEEBA and the City of New York, Report and Recommendations*, January 14, 2012, Viani, Impasse Panel, Case No. I-2-09, at 19.

In addition, the Impasse Panel referred to a June 2008 consultant's report (the Smith Report) which the Impasse Panel had barred from evidence, but nonetheless had considered, stating that "[t]he Smith Report submitted findings entirely consistent with those listed above...." *Id.*

The decision recommended the following terms and conditions of employment:

"1) The term of the Agreement shall run from October 20, 2005 through March 31, 2010. The first effective date marks the date at which LEEBA gained recognition as the Union representing EPOs. The end date is aimed at serving a dual purpose: First, to maintain the new agreement in the same timeframe as the prior contracts (that is, renewing each April 1), which has administrative benefits while maintaining continuity of terms and conditions of employment; second, to foster sound labor relations, it makes eminent sense to bring the collective bargaining agreement for this unit of employees into the same timeframe as their New York City municipal counterparts, all of whom have agreements that expire in 2010. This Panel recognizes that it is too far past 2008 to recommend an agreement that would end in 2008 and trigger, almost immediately, another round of bargaining. This recommended time frame will bring greater efficiency to the labor

relations processes between the parties.

2) The wages for all levels and steps of EPOs shall conform to a uniformed services pattern. Under a new agreement, the general wages increases recommended below shall be applied to an employee's base salary, salary increment steps, current minimum and maximum salary rates, longevity increases, assignment differentials and existing advancement increases (if any).

- Effective 10/20/05, a wage increase of 5%;
- Effective 4/1/06, an additional wage increase of 4%;
- Effective 4/1/07, an additional wage increase of 4%;
- Effective 4/1/08, an additional wage increase of 4%;

and

- Effective 4/1/09 and through 3/31/10, an additional wage increase of 4%.

3) Concerning the demands regarding a 40-hour workweek and overtime pay, this Panel has determined that while these terms might be appropriate, there is insufficient information in the record regarding this proposed change to recommend any change in the length of the workweek and current overtime arrangements under the Fair Labor Standard's Act.

4) The new agreement shall include the standard unit agreement Recognition Clause, which shall include all levels of EPOs for which Union possesses recognition, including all "in house" designations such as Detective, Sergeant, et al.

5) The annual contribution to the Union's Welfare Fund shall be the same as provided other bargaining units covered by standard unit agreements; to wit, \$1540 effective 10/1/05 and \$1640.00 effective 4/1/10 (explanatory footnote omitted)

6) The remaining economic benefits, discussed specifically below, shall begin on March 31, 2010. This Panel has determined that it is reasonable to delay the start of these benefits until that date because they will have already been received in the past, the delay will ease their administration, and the delay helps reduce the cost to the City of these changes.

7) Effective March 31, 2010, the Uniform Allowance for

all EPOs shall be increased to \$1,000 under the same terms and conditions as currently proved to NYC Police Officers. This Panel finds that as police officers, who we find for collective bargaining purposes should be treated in a similar fashion to the uniformed services of the City, and who are required to wear complex uniforms that are virtually identical to the NYPD, there is no justifiable reason for providing the EPOs with a different uniform allowance than was agreed to with the NYPD. The cost incurred by the EPOs to purchase and maintain these required uniforms is substantial, regardless of initial provision of uniforms by the City (Union Exhibit 51), and beyond the \$250 allowance currently provided. (Tr. 763, 722, 233-38). For example, EPO Adreani testified that after taxes, the allowance covers only the costs of one pair of seasonal boots and he estimated that he spends closer to \$1,000-1,200 annually to maintain his on [sic] required uniform. (Tr. 685, 722-23)

8) Effective March 31, 2010, the Night Shift Differential shall be raised to 10% and the timing for eligibility for such payments shall begin at 8:00 p.m. These changes revert to the former terms, previously provided under the Citywide Agreements.

9) Effective March 31, 2010, the Injury on Duty leave shall be modified from the existing provisions of the Citywide Agreement to be 18 months leave of absence with pay for any injury occurring while on duty. This recommendation expands the assault-related provisions of Citywide Contract to cover all injuries whether by assault or other causes. Moreover, this leave shall be granted without charge to sick or annual leave. Because EPOs are police officers and are first responders in emergencies, there is great potential for serious injury in their daily duties and these modifications are intended to treat these employees in a manner more consistent with other emergency and uniformed services employees, such as with the NYPD or the Fire Department.

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10) Effective March 31, 2010, the Union will be permitted to allocate from its Welfare Fund up to \$75 per employee per year for the purposes of establishing a Legal Defense Fund to be used to defend EPOs from actions directly related to the performance of their

duties."

*Id.* at 22-26.

LEEBA appealed the decision of the Impasse Panel in part and the City appealed the decision in its entirety to the OCB. In a decision dated May 29, 2012, the four-member BCB issued the First Award, with one member of the board dissenting, affirming the decision of the Impasse Panel with respect to the terms and conditions of employment of the EPOs.

Setting forth the standard of review it must use in considering the decision of the Impasse Panel, the BCB stated that its function was "limited to deciding 'whether the parties have been afforded a fair hearing and whether the record provides substantial support for the result reached by the impasse panel.'" 5 OCB2d 18, at 17, quoting DC 37, 4 OCB 2d 29 at 9 (BCB 2011). The BCB further noted that its role was not to substitute its own judgment for that of the Impasse Panel in either determining the facts or adjudicating the merits of the decision. *Id.*

The BCB noted that the report and recommendations of the Impasse Panel should be upheld unless those recommendations

"were not based on objective and impartial consideration of the entire record, and unless clear evidence is presented on appeal either that the proceedings have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law."

*Id.*, quoting *DC 37*, 4 OCB2d 29, at 10. The BCB then noted that neither party has alleged that the decision of the Impasse Panel was tainted by fraud.

With respect to the underlying issue of whether the contract should be based on a civil or uniformed services pattern of settlement, the BCB looked to the findings of the Board of Certification, which certified LEEBA as the bargaining representative for the EPOs and on which the Impasse Panel relied, in concluding that a uniformed services pattern of settlement should apply. The BCB rejected the City's contention that the Impasse Panel did not give proper consideration to the financial impact on the City if the uniformed services pattern of settlement were adopted. The BCB noted that the Impasse Panel did in fact consider the financial impact in its decision to reject LEEPA's request for full pay and benefit parity with the NYPD. *Id.* at 22.

With respect to the issue of the duration of the contract, BCB found that, the duration of a contract is a mandatory subject of collective bargaining, and that, therefore, under section 12-311 (c) of the NYCCBL the matter could properly be considered by the Impasse Panel.

Regarding the Smith Report, the BCB noted that the report was merely a draft, that in declining a Freedom of Information Law request for the report, DEP had expressed concern that making

the report public could jeopardize the security of the City's water and wastewater system, and that for that reason, the Impasse Panel only permitted LEEBA representatives to view a redacted version of the report in order to prepare to examine or cross-examine a City witness. Finally, the BCB noted that the Trial Examiner had denied LEEBA's motion to include the report in the record on appeal before BCB. For these reasons, the BCB concluded that it was proper to exclude the Smith Report from evidence, but found reference to a document not in evidence to be "problematic," remanding the matter to the Impasse Panel with directions to: "1) excise all references to the DEP consultant's report from the Panel's report; 2) determine whether it would have reached the same conclusions and made the same recommendations without any consideration of the referenced portions of the consultant's report; and 3) to the extent that the Panel deems it necessary or appropriate, clarify and/or amend the Report accordingly." *LEEBA*, 5 OCB2d 18, at 1 (BCB 2012).

On July 2, 2012, the City filed a petition seeking that the May 29, 2012 decision of the BCB be vacated in its entirety, on the following bases: 1) the decision to award a 53-month contract violated due process because the parties had no notice that the Impasse Panel would consider a term longer than that suggested by the City and not objected to by LEEBA; the decision violated the NYCCBL because BCB's powers are limited to matters in dispute and

there was no dispute between the parties concerning the length of the contract; and there was no record made before the Impasse Panel regarding a 53-month contract, thus the decision was based upon matters outside of the record; 2) there is no authority in the NYCCBL for BCB to remand the matter to the Impasse Panel; and 3) even if BCB had the authority to remand the matter to the Impasse Panel, because the BCB affirmed the Impasse Panel's report in all respects other than its reference to the Smith Report, the remand was impermissibly tainted with error.

On or about July 20, 2012, the OCB and Marlene Gold, as chair of the BCB filed a cross motion to dismiss the City's petition. On July 16, 2012, LEEBA filed an answer and cross petition arguing that the Smith Report should have been admitted into evidence by the Impasse Panel, that the EPOs should be granted full parity with the NYPD with respect to terms and conditions of employment, and the contract period selected by the Impasse Panel had a rational basis and did not prejudice the City.

Prior to any action being taken in this court on the City's petition and LEEBA's cross petition, on June 30, 2012, the Impasse Panel issued its decision responding to the BCB's remand, expunging references to the Smith Report, and stating that:

"this Panel's recommendations are based solely and exclusively on the testimony and documentary evidence in the record of this proceeding, which are extensively cited and referenced herein. The content of the Smith

Report were not relied upon by this Panel for findings of fact, nor was that report considered substantive evidence as a basis for any of this Panel's recommendations. The reference to the Smith Report was made solely to note that a consultant employed by Department of Environmental Protection arrived at similar (but not identical) conclusions concerning personnel matters as arrived at by this Panel. This Panel, without any consideration of the Smith Report, would have (and has after a reconsideration of the evidence) arrived at the same conclusions, findings of fact, and recommendations as are contained in this Amended Report and Recommendations and this Panel's January 14, 2012 Report and Recommendations."

*In the Matter of the Impasse between LEEBA and the City of New York*, amended June 30, 2012, at 1, n 1.

Again both LEEBA and the City appealed the decision of the Impasse Panel to the OCB. LEEBA objected to the exclusion of the Smith Report from the decision of the Impasse Panel and reasserted all of its earlier objections to the January 14, 2012 decision of the Impasse Panel. The City contended that remand was inappropriate and did not cure the Impasse Panel's improper consideration of the Smith Report, and also reasserted its prior objections to the January 14, 2012 decision.

On September 4, 2012, a six-member BCB, with two members dissenting, issued the Second Award. The BCB found that the Impasse Panel had complied with its remand order to excise all references to the Smith Report. The BCB rejected the City's argument that the continued finding by the Impasse Panel that there were "trends" in the expansion of the EPOs duties indicated that the Impasse Panel was still relying on the Smith Report.

Citing evidence considered by the Impasse Panel, such as a report offered in evidence by the City titled "Selected Crime Statistics for DEP Police 2006-09," and witness testimony regarding the EPOs' involvement in law enforcement unrelated to watershed duties, the BCB concluded that the Panel appropriately based its findings, conclusions, and recommendations on an objective and impartial consideration of the record, and that the record provided substantial evidence on which to base those findings, conclusions and recommendations. Thus, the BCB concluded that reevaluating the Panel's decision was not justified, and it therefore, affirmed the Impasse Panel's amended report in its entirety.

On October 5, 2012, the City filed an Amended/Supplemented Petition, seeking to vacate both the First and Second Awards of the BCB for the same reasons set forth in its initial petition, arguing both that the remand was improper and unauthorized, and that the revised decision of the Impasse Panel was purely cosmetic.

On November 8, 2012, LEEBA filed an Amended Supplemented Cross Petition, agreeing with the City that BCB did not have the power to order the Impasse Panel to excise references to the Smith Report or order the Impasse Panel to modify its recommendations, but reached a different conclusion regarding the decision of the BCB. LEEBA again argued that the Impasse Panel

should have included the Smith Report in the record and again argued that the EPOs should be granted parity with members of the NYPD. LEEBA also challenged the impacts of the decision of the DCAS to place EPOs in a Miscellaneous Service classification. Finally, LEEBA supported the 53-month term for the contract as rational.

As a preliminary matter, in its cross motion to dismiss the City's petition, OCB argues that the original petition and cross petition challenging the May 2, 2012 decision of the BCB were premature, because that ruling was not a final decision under Article 75 of the CPLR. *Greece Town Mall, LP v Mullen*, 87 AD3d 1408, 1408-1409 (4<sup>th</sup> Dept 2011). The City contends that the challenge to the BCB's action was appropriate because, pursuant to Article 78 of the CPLR, it could seek review of an action taken by the BCB which was allegedly beyond its authority.

Since the filing by the City of its initial petition, however, the Impasse Panel has issued a new decision, and the BCB affirmed that decision on September 4, 2012 in the Second Award. The City has reiterated its objections on the merits to the original decision and has again challenged the authority of the BCB to remand to the Impasse Panel. It is, therefore, unnecessary for this court to reach the question of whether the original petition was premature, since that question is effectively moot.

In reviewing an award in a compulsory arbitration, "[t]he court may not second-guess the decision of the arbitration panel." *Matter of Watt v Roberts*, 37 Misc 3d 1231(A), 2009 NY Slip Op 52852(U), \*5 (Sup Ct, NY County 2009), *affd* 79 AD3d 525 (1<sup>st</sup> Dept 2010). Rather, the court "is limited to considering whether the award is arbitrary and capricious and ascertaining that the 'criteria specified in the statute were "considered" in good faith and that the resulting award has a "plausible basis."' " *Matter of Watt v Roberts*, 79 AD3d 525, 525 (1<sup>st</sup> Dept 2010), quoting *Caso v Coffey*, 41 NY2d 153, 158 (1976). Thus, the standard to be employed by the court is much like that used by the BCB in reviewing the decision of an impasse panel.

The City contends that the BCB exceeded its power when it remanded the matter to the Impasse Panel with directions to address the Smith Report, because, the NYCCBL provides only that the BCB may "affirm or modify the panel recommendations in whole or in part" or "set aside the recommendations of an impasse panel in whole or in part." NY Code § 12-311 (c) (4) (c). According to the City, the BCB has no authority to remand a matter to the Impasse Panel for further action.

The court agrees with the BCB that the length of a contract is a matter within the scope of collective bargaining and thus could properly be addressed by the Impasse Panel, pursuant to section 12-311 (c) (3) (c) of the NYCCBL (NYC Code § 12-311 (c)

(c) (c). The court is also inclined to agree with the BCB that a remand to the Impasse Panel to clarify the significance of its reference to the Smith Report and excise references to that report from its decision were within its power to "modify the panel recommendations in whole or in part" or to "set aside the recommendations of an impasse panel in whole or in part." NYC Code § 12-311 (c) (4) (c).

The City further argues that: 1) given that the BCB remanded the matter of the Smith Report to the Impasse Panel because of its conclusion that reference to the substance of the report, which was not in evidence, was "problematic" (see *LEEBA*, 5 OCB2d 18, 29 [BCB 2012]), it was improper for the BCB to affirm the remainder of the decision of the Impasse Panel; and 2) following the remand, the Impasse Panel failed to cure its reference to the Smith Report in its Report and Recommendations amended June 30, 2012.

With respect to BCB's determination that the Impasse Panel was correct in applying the law enforcement pattern of settlement for determining the wages, benefits and other terms and conditions of employment of EPOs, rather than that of civilian employees, the BCB first noted that neither the City nor *LEEBA* have alleged that the impasse proceeding was tainted by fraud or bias. See *LEEBA*, 5 OCB2d 18, at 18 (BCB 2012). The BCB then looked at the bases stated by the Impasse Panel in its conclusion

that the uniformed pattern of settlement should be applied to EPOs. The BCB noted the Impasse Panel's reliance on the fact that in 2005 the Board of Certification certified that EPOs should no longer be part of a civilian collective bargaining unit, and recognized that significant changes had occurred justifying that certification. The BCB further noted that evidence presented to and relied on by the Impasse Panel indicated that

"... the duties, responsibilities, jurisdiction and training of the EPOs and their predecessor titles had evolved over the years, increasingly so since 2000, such that currently EPOs have the authority to patrol and exercise full police powers both within New York City and outside the City, including performing anti-terrorism duties and communicating with other law enforcement agencies concerning criminal and terrorist activities. They have been given special training in interrogation, biochemical incidents, weapons of mass destruction, homicide investigation, handling Hazmat materials, and special weapons. They have been organized into new "Specialized Units," including an Emergency Service Unit, Strategic Patrol, four Canine Units, an Aviation Unit, a SWAT Team, and an increased Marine Unit. EPOs regularly work, alongside other law enforcement officers and, within the City, coordinate with the NYPD on activities that are not on DEP property. They have been assigned special deployments to supplement NYPD cooperate at protest sites. In sum, EPOs are involved in a full range of police activities and duties."

LEEBA, 5 OBC2d 18, at 19-20. In summarizing these findings by the Impasse Panel the BCB noted that at pages 13-19, the decision cited multiple references to the testimony and exhibits presented by the parties which supported its findings. Although page 19 of the report did discuss the Smith Report, pages 14-18 of the report cites a myriad of other Exhibits of the City, LEEBA, Joint

Exhibits, and transcript references.

The references to the Smith Report follow the statement of the Impasse Panel that "[t]his Panel agrees that the evidence before the Board of Certification and the additional facts presented at these hearings are indicia that the EPOs are involved in a full range of police activities and duties." *Id.* at 19. The Impasse Panel then states, "[t]he Smith Report submitted findings entirely consistent with those listed above, including the acknowledgment of the significant counter-terrorism and law enforcement duties of the EPOs as a small police agency dedicated to protection of the water supply throughout New York City and parts of the State." *Id.*

Applying the standard of review mandated for assessing an arbitration award, the court concludes that in its First Award the BCB had a plausible basis for affirming the conclusion of the Impasse Panel that a uniformed, rather than a civilian pattern of settlement should be applied to the EPOs, and that the decision of the BCB was not arbitrary and capricious, that there was adequate evidence in the record on which to base its determination (see *Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 184 [1990]), and any reference by the Impasse Panel to the Smith Report was merely cumulative and constituted harmless error under the circumstances. See *First Help Acupuncture, P.C. v Hudson Ins. Co.*, 7 Misc 3d 1012(A), 2005 NY

Slip Op 50565(U) \*3 (Civ Ct, Kings County, 2005) (although statement of master arbitrator was erroneous, it was merely cumulative evidence and therefore constituted harmless error).

Thus, the court concludes that though affirming the decision of the Impasse Panel while remanding one aspect of the decision for further action and explanation may have been ill considered, there was certainly adequate evidence in the record to justify the BCB's affirmance of the determination of the Impasse Panel, and the reference to the Smith Report by the Impasse Panel did not sufficiently taint the integrity of the proceeding so as to warrant vacating the arbitration award.

The court also rejects the City's argument in its amended petition that by referring to "trends" in the expansion of the EPOs' job functions in its amended Report and Recommendations, the Impasse Panel failed to cure its improper reference to the Smith Report.

Finally, the court notes that in contrast with the City, LEEBA seeks modification of the awards of the BCB to the extent that it refused to admit the Smith Report into evidence. That argument, too, is rejected, since "the exclusion of cumulative evidence, at most, constituted harmless error." *Barry v Long Is. Univ.*, 8 AD3d 519, 519 (2d Dept 2004).

Citing *Matter of Fischer (Queens Tel. Secretary)* (106 AD2d 314 [1<sup>st</sup> Dept 1984]), the City further argues that the

arbitration award must be vacated because by referring to the Smith Report, the Impasse Panel considered evidence that was outside of the record. The *Fischer* case is plainly distinguishable, for in *Fischer*, there was a pending fee dispute between the arbitrator and one of the parties to the arbitration which according to the Court, could fairly "raise questions as to the misconduct or partiality of [the] arbitrator, by which appellants' rights were prejudiced." *Id.* at 314. Additionally, the arbitrator had ex parte discussions with one of the parties concerning his fees, which according to the concurring judge, was some evidence of personal bias of the arbitrator. *Id.* at 316-317, Kassal, J. (concurring). Although the City seeks to characterize the reference by the Impasse Panel to the Smith Report as an ex parte communication, the court considers that characterization to be inaccurate. Moreover, there is no suggestion whatever that the reference to the Smith Report, even if an error, in any way reflected personal bias by the arbitrator as did the question of personal fees in *Fischer*.

The City also argues that the arbitration award must be vacated because the Impasse Panel selected a term of 53 months for the contract when the length of the term was not in dispute between the parties and the Impasse Panel did not indicate that it would consider a different term than the 30-month term proposed by the City.

Citing *Matter of Buffalo Professional Firefighters Assn., Inc., Local 282, IAFF, AFL-CIO-CLC (Masiello)* (13 NY3d 803, 804 [2009]), the City argues that it was beyond the power of the Impasse Panel to consider the length of the contract, because the issue was not disputed by the parties. There, however, the arbitrator considered an issue which the parties had affirmatively agreed, as part of their memorandum of agreement, that the city would withdraw from the consideration of the arbitration panel. Here, in contrast, there was no such agreement.

Finally, the City argues that consideration of the length of the contract without notifying the parties and obtaining their input on the matter, constituted a denial of due process. Although this court agrees with the BCB that the duration of the contract was a matter that was a proper subject of collective bargaining and in the purview of the Impasse Panel, the court is inclined to agree with the City that it was improper for the Impasse Panel to consider the duration of the contract without notifying the parties. See *Quinn v Cannabis Haircutters*, 72 AD2d 765, 765 (2d Dept 1979), citing *Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976).

Finally, LEEBA seeks to affirm the arbitration award in part and to vacate it in part. While LEEBA agrees with the decision of the BCB that the uniform pattern of settlement should be

applied to EPOs, it argues that the BCB was in error in not granting EPOs pay parity with members of the NYPD. LEEBA contends that, under the Fair Labor Standards Act (29 USCA §§ 201 *et seq.*) and section 115 of the New York State Civil Service Law, EPOs should have been granted the same pay and other terms of employment such as sick leave and length of the work week, as members of the NYPD. It further contends that the Impasse Panel should have addressed the scheme for promotion of EPOs to supervisory positions. With respect to the issue of salary, LEEBA contends that the Impasse Panel and the BCB erroneously considered the financial impact on the City in staging the salary increases in steps over a five-year period. LEEBA argues that the Impasse Panel failed to consider evidence that the Water Board reimburses New York City for the salary of the EPOs and that the Water Board can adjust water rates of customers in order to absorb the increase in pay of EPOs. In short, LEEBA contends that the Impasse Panel and the BCB failed to compare the "wages, hours, fringe benefits, conditions and characteristics of employment" of the EPOs with members of the NYPD, as required by the NYCCBL. NYC Code § 2-311 (c) (3) (b) (i).

Again, this court must consider the standards to be applied in examining an arbitration award. As noted above, courts have a limited role in examining an arbitration award.

"A court cannot examine the merits of an arbitration award and substitute its judgment for that of the

arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice.'"

*Matter of Professional, Clerical, Tech., Empls. Assn. (Board of Educ. for Buffalo City Sch. Dist.)*, 103 AD3d 1120, 1122 (4<sup>th</sup> Dept 2013), quoting *Matter of New York State Correctional Officers & Police Benevolent Assn., Inc. v State of New York*, 94 NY2d 321, 326 (1999). Rather, the court must determine whether the award is arbitrary and capricious and whether there is a plausible basis in the record for the award. *Matter Watt v Roberts*, 79 AD3d at 525. Applying that standard, the court denies that part of LEEBA's amended cross petition that seeks to modify the award in part.

In summary, the one aspect of the arbitration award which cannot stand concerns the duration of the contract. However, a remand of the matter to the BCB for reconsideration of that issue based upon the appropriate input of the parties does not require the invalidation of all aspects of the award. Rather, the court affirms the award except to the extent of the determination of the duration of the contract and vacates the award to that extent. Accordingly, it is hereby

ADJUDGED that the petition and amended petition of the City of New York to vacate the arbitration are granted, to the extent that the award is vacated with respect to the duration of the

contract between the City of New York and the Law Enforcement Employees Benevolent Association, and that matter is remanded to the Board of Collective Bargaining to reconsider consistent with this decision, and the petition and amended petition are otherwise denied; and it is further

ORDERED that the motion of the the New York City Office of Collective Bargaining to dismiss the petition of the City of New York is denied; and it is further

ADJUDGED that the cross petition and amended/supplemented cross petition of the Law Enforcement Employees Benevolent Association are denied.

Dated: July 23, 2013

**U N F I L E D J U D G M E N T**  
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

ENTER:

[Signature]  
J.S.C.

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