AN ANALYSIS OF PERSONNEL

By The Board of Collective Bargaining

* A Report of the Mayor's Management Advisory Board.
AN ANALYSIS
BY
THE BOARD OF COLLECTIVE BARGAINING
OF
PERSONNEL

A Report of The Mayor's Management Advisory Board

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TO:  Honorable John E. Zuccotti, First Deputy Mayor
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     Honorable Donald D. Kummerfeld, Director of Management
         and Budget
     Honorable Anthony C. Russo, Director of Municipal
         Labor Relations

FROM: Board of Collective Bargaining

Enclosed is the Board of Collective Bargaining's Analysis of the
Mayor's Management Advisory Board's Personnel Report. I am for-
warding the BCB's Analysis for your review and consideration as
the Review Committee designated by the Mayor to study the pro-
posals set forth in Personnel.

The Board of Collective Bargaining has studied the MMAB's Report and
believes that several of its proposals, particularly those recommend-
ing management development programs and simplification of the City's
personnel classification system, are well stated and deserving of
serious consideration. We endorse the MMAB's theme that there
exists a need to strengthen the City's managerial class and the
City's management systems, including enhancing the City's ability
at the bargaining table and in personnel and contract administra-
tion. We believe this can be done without impairing existing sound labor
relations structures. As a tripartite Board consisting of representa-
tives of labor, management and the public, we believe, as the MMAB
states in the "Foreword" to its Report, that the process of discus-
sion and negotiation between labor and management is essential to
achieving improvement in the City's personnel system.

However, our study and analysis of Personnel reveals that several
of the MMAB proposals, particularly those concerning the restruc-
turing of the Board of Collective Bargaining, deletion of the practical
impact clause of the New York City Collective Bargaining Law and consideration of the employer's ability to pay in labor negotiations and impasse proceedings, are based on errors of fact and law which, if adopted, would have the effect of hindering the process of consultation and cooperation between labor and management.

We have published our Analysis of Personnel because we firmly believe that the City policy makers should have the benefit of a thorough review of the record of present labor relations processes before recommending implementation of certain MMAB proposals which we find to be ill-advised. As stated in the concurring comments of the City Members of the Board of Collective Bargaining, we are committed to developing and maintaining a sound labor relations structure for the City, which obviously includes a strong and effective City Office of Municipal Labor Relations and a dedication to the process of collective bargaining.

We thank you in advance for the consideration of our views and would welcome further discussion of our Analysis of the MMAB Report.

Arvid Anderson
Chairman

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SUMMARY OF THE ANALYSIS BY THE BOARD OF COLLECTIVE BARGAINING OF PERSONNEL

We have studied the Mayor's Management Advisory Board's (MMAB) description of the City's current personnel system and its list of priorities and recommendations for improvement in the "personnel system." We believe many of the MMAB proposals, particularly those recommending management development programs and simplification of the City's personnel classification system, are well stated and deserving of serious consideration. However, our analysis reveals that certain of the MMAB proposals are based upon mistakes of fact and erroneous assumptions. We comment primarily upon those recommendations which propose revisions in the New York City Collective Bargaining Law (NYCCBL), the State Taylor Law, and the manner of conducting City labor relations. We summarize our attached analysis of the MMAB proposals:

1. MMAB Proposal: Restructure the BCB

The MMAB claims that the BCB needs to be "clarified" because its structure differs from that of the State Public Employees Relations Board (PERB) and, therefore, the BCB "does not make clear the superiority of the public interest."
This superficial and unsupported assertion, rebutted in the past, is based upon misconceptions of law and fact. The record shows that the Board and neutrals appointed by it, implementing the public policy of the State and of the City, have acted and continue to act in the interest of the health, safety and security of the citizens of New York. As example, we note the recent Report and Recommendations of an Impasse Panel which determined that police officers were to work ten additional days per year; an award which was upheld unanimously by the BCB. Further evidence that the Board acts in the public interest is that the courts have sustained BCB decisions in 13 of the 14 times BCB decisions have been challenged in court. It should also be noted that the vast majority of BCB decisions have been rendered without dissent by the City or Labor members of the Board.

The restructured BCB, suggested by the MMAB, would grant to City management the power to appoint four of the five members of the quasi-judicial BCB. Such a Board, which the MMAB recommends be composed of persons not "currently professionally involved in New York City's labor relations system" and who apparently would serve at the pleasure of the Mayor, would not have the trust or respect of the municipal labor-management community as a truly neutral and independent board.
In our opinion, this MMAB proposal would destroy the spirit of
labor-management consultation and cooperation which the MMAB
advocates in the Foreward to Personnel.

This is not to say that the system of administering
municipal labor relations in New York City is perfect or that
it cannot be improved. However, we would suggest to the MMAB
that the first step in securing improvement is an understanding
of the record and the strength of the present system.

2. MMAB Proposal: Deletion of the Practical
Impact Clause of the
NYCCBL and Elimination of
Bargaining on Permissive
Subjects of Collective
Bargaining

The MMAB contends that the broad interpretation given
the practical impact clause of the NYCCBL by OCB coupled with
bargaining on permissive subjects of bargaining have allowed
municipal unions to erode management prerogatives and have
left few issues relating to the management of the City's
workforce under managerial control.

These unsupported and unsupportable assertions are
particularly ironic in that the Municipal Labor Committee (MLC),
in a formal statement, has criticized OCB for what the MLC
termed were extremely narrow and conservative judgments with
respect to scope of bargaining issues and practical impact
determinations.

In fact, the record shows that in 10 of 12 petitions
filed by unions demanding practical impact bargaining, the BCB
has upheld the City's contention that the practical impact of
a management decision did not cause the workload of employees to become unduly burdensome or unreasonably excessive as a regular condition of employment so as to require bargaining over such effect. Moreover, the Board has made scope of bargaining determinations in strict accord with PERB and Court of Appeals decisions, and no such determination has ever been struck down by a court.

With regard to practical impact bargaining, the Board has developed a mechanism which allows the City, upon a finding of practical impact, to attempt to relieve the condition of unduly burdensome or unreasonably excessive workload before the City is required to bargain with a union over the practical impact resulting from the exercise of a managerial prerogative.

Bargaining on permissive subjects has recently resulted in a productivity agreement, signed by most municipal labor unions. Under the terms of this agreement, joint Labor-Management Productivity Committees are to be formed in each municipal agency for the purpose of developing the means for delivering agency services more efficiently and at decreased costs. This would not have been possible if the City were prohibited from bargaining on voluntary subjects.

The provisions for practical impact bargaining and bargaining on permissive subjects in the Taylor Law have been upheld by the State Court of Appeals. Deletion of the practical impact clause from the NYCCDL and its amendment to restrict bargaining on permissive subjects would not relieve the City
of its obligations in these respects under the State law in
light of the "substantial equivalency" requirement in the
Taylor Law.


A) Recognition of the Employer's Ability to Pay in Negotiations and Impasse Proceedings.

Obviously, the employer's ability and inability to pay has great relevance in contract negotiations or impasse proceedings in both the public and private sectors. However, the MMAB erroneously assumes that the City's ability to pay has not been adequately considered in contract negotiations or by impasse panels.

The failure of the MMAB to offer any illustrations or citation of authority for such an assumption is significant. On October 20, 1976, Arvid Anderson, Chairman of OCB, forwarded to Lawrence Lachman, Co-Chairman of the Personnel Task Force of the MMAB, comprehensive documentation of consideration of the ability to pay factor by impasse panels, in addition to other public documents.

The facts show that negotiators for the City and for public employee unions regularly argue and document the employer's ability or inability to pay when they present cost-occurring issues for consideration and recommendation by impasse panels. This is also the case in contract negotiations which do not go to impasse.
The NYCCBL presently mandates that impasse panels consider "the interest and welfare of the public", which language obviously includes, and has been repeatedly interpreted by impasse panels to include, the employer's ability to pay. A review by the MMAB of recent impasse panel reports would have revealed that these are replete with citations of the employer's ability or inability to meet the costs of the demands of employee representatives.

Moreover, the BCB has held that all impasse panel recommendations are and have been bound by the emergency fiscal legislation since the enactment of these laws in September 1975.

The Civil Service and Labor Committee of the City Council recently concluded that it was unnecessary to amend the NYCCBL to specifically mandate consideration of ability to pay in impasse proceedings in view of the history of consideration of the employer's ability to pay by impasse panels and the BCB.

Under the "cost-sensitive" collective bargaining system proposed by the MMAB, bargaining over employee demands for wage increases, which inherently includes discussion of the City's ability to pay such increases, would be segregated from bargaining over employer demands for greater productivity. The history of municipal collective bargaining shows that the two concepts are intimately tied together. Indeed, Administrative Order No. 28, recently issued by Deputy Mayor John Zuccotti, provides for the payment of cost-of-living increases to em-
ployees upon the achievement by the agency in which they are employed of productivity savings without a reduction in the level of services provided by the agency.


The MMAB calls for the establishment of an independent agency which would oversee the collective bargaining processes of all public agencies serving in New York City. The MMAB states that as the Emergency Financial Control Board is, in effect, currently performing this function, its term should be extended beyond the expiration date of the Emergency Financial Control Act.

In the past, it has been proposed by the Taylor Committee, previous Mayors, the PERB and OCB that OCB's jurisdiction be expanded to cover all agencies serving New York City. However, the legislature has not enacted the required legislation. Thus, we favor the organization of such an all-encompassing entity and do not comment on the MMAB recommendation other than to point out some of the practical and legal considerations not touched upon in the Report.

C) Reform of the Prevailing Wage Rate System.

We do not comment on this MMAB proposal except to point out legal considerations not discussed in the Report. We recommend that the City give all interested parties, including
the unions representing municipal craftsmen, an opportunity to
comment before taking action on the proposals.

4. **MMAB Proposal**: Develop an Integrated Personnel System

The MMAB recommends several constructive proposals for accomplishing this goal. However, some of these and other proposed reforms of the City's personnel system would require comprehensive amendment of City and State law.

We also find that the MMAB gives incomplete consideration to complex issues in making some of its recommendations for reform of the City's personnel system. For example, the MMAB proposes elimination of grievance arbitration of disciplinary grievances, which is expressly provided for in the NYCCBL, and recommends replacing it with a procedure culminating in an appeal to State Supreme Court. We point out that under the Taylor Law grievance arbitration is a mandatory subject of bargaining and that the New York City law is required to be substantially equivalent to the Taylor Law. We also note that court actions are generally more costly and more time consuming than is arbitration.

We recommend that if any revision of the City's personnel system is to be undertaken, consultation with all interested parties -- labor, management and the public -- should be considered, not only as a matter of good policy, but as the only practical means of achieving the necessary legislative amendments.
CONCLUSION

In conclusion, our objections to the Mayor's Management Advisory Board's Personnel Report concern the proposed major revisions of the NYCCBL, the structure of the BCB and the manner of conducting City labor relations. Although we do not believe the present law and structure of municipal labor relations to be perfect, it is our opinion that recommendations for major revision ought not be based on the patent misconceptions of law and fact so prevalent in the Report. While the MMAB recognizes in a general way that legislation may be necessary to implement its proposals, the Report does not specify the amendments to the Taylor Law, the Civil Service Law and the NYCCBL which would be necessary. Furthermore, we believe that any amendments of statutes and reform of the City's labor relations structure should seek to strengthen, not destroy, the system of labor-management consultation and the spirit of cooperation between the City and municipal labor unions fostered by and existing since the enactment of the NYCCBL. Such improvements ought to be the product of joint deliberations by the City, the municipal labor unions and the OCB -- as well as other interested parties, including the MMAB, if it is willing to participate.
CONCURRING COMMENTS OF THE
CITY MEMBERS
OF THE
BOARD OF COLLECTIVE BARGAINING

As employer (City) representatives on the New York City Board of Collective Bargaining, we concur with the observations contained in the BCB Analysis commenting on the Mayor's Management Advisory Board Report entitled PERSONNEL.

It is unfortunate to find serious misunderstandings in this Report which relate to proposed revisions of the New York City Collective Bargaining law and City labor relations. We trust that these areas of the Report, as delineated in the BCB Analysis, will not detract from the many worthwhile recommendations in other aspects of the Report.

We have the following additional observations:

(1) Most observers agree there is a need to avoid a repetition of the errors in City labor-management negotiations in past years which resulted in many ill-advised and unwarranted settlements such as in the pension area. However, wishful thinking that some "magic bullet" approach will accomplish this result by changing the review mechanism is unrealistic. The basic problem lies elsewhere.

(2) The track record of the present Board of Collective Bargaining in reviewing the collective bargaining results
is, on the whole, a very favorable one as the Analysis above will confirm. Undoing some of the restrictions on managerial discretion given away by the City or other agencies, such as the class size limitation for teachers, the two-man patrol car rule for police, the three-men-on-a-truck for sanitation workers, the case load maximum for welfare workers, and the buddy system for housing employees lies outside the province of the Board of Collective Bargaining. To state the matter succinctly, these decisions are more related to weak-kneed negotiating or political decisions by the agency involved. We certainly agree that a major need is to assure a strong City Office of Municipal Labor Relations and other negotiating agencies and stronger bargaining practices insulated from political pressures to the extent possible, perhaps in the manner recommended in the PERSONNEL report. But revising the Board of Collective Bargaining seems irrelevant to the problem.

(3) No realistic solutions can be achieved on a unilateral basis, even short-term. The tri-partite system established in the current Board of Collective Bargaining has been an effective mechanism to permit Union, Management (City) and Impartial representatives to work together in a public-interest manner, governed by legislated criteria. In particular, we believe the union representatives have been
constructive and realistic in voting to uphold the criteria established to govern the actions of the Board.

(4) The Board of Collective Bargaining has proven to be a workable mechanism, but this or any substitute agency will not cure the problem of ineffectual representation at the bargaining table. What is needed is negotiation on behalf of the City and in the public interest that is tough, realistic, and apolitical, and fortunately this is not only desired by the Mayor but, in our judgment, is increasingly in evidence.

(5) In our judgment, Impartial members of the Board of Collective Bargaining, as experienced and knowledgeable individuals of reputation, have served with distinction and supported the criteria enjoined upon the Board of Collective Bargaining. There is, of course, a need to be vigilant about the list of arbiters from which the parties choose panels in impasse situations to assure that only able individuals of reputation will be selected for such panels.

(6) The Report correctly stresses the need to strengthen the City's managers and management systems, and this is especially applicable to labor-management relations. One critical need is a system to prevent the "end-run" around City negotiators by unions to obtain unwarranted concessions
from political leaders. The criteria established by the Emergency Financial Control Board temporarily restrain these "end-run" tactics. At the present time both City negotiators and the Board of Collective Bargaining regard the EFCB criteria as governing. More permanent safeguards should be considered as suggested in the PERSONNEL report, and the Board of Collective Bargaining can play an important role in this process.

(7) We agree with the absolute necessity for a centralized mechanism that can effectively coordinate the labor relations policies of the City's Mayoral and independent agencies. Otherwise, the spill-over impact of imprudent decisions will be irresistible due to "me-too" demands of less-favored unions.

We commend for serious study other recommendations of the Management Advisory Board's Report, but we earnestly suggest reconsideration of the items covered in the foregoing Analysis.

City of New York Members

Virgil B. Day

Edward Silver
ANALYSIS BY THE
BOARD OF COLLECTIVE BARGAINING
OF THE
MAYOR'S MANAGEMENT ADVISORY BOARD
PERSONNEL REPORT

INTRODUCTION

The following is an analysis by the Board of Collective Bargaining commenting on the findings and recommendations set forth in Personnel, a report of the Mayor's Management Advisory Board (MMAB), which relate to the work of the OCB and to City labor relations.

Personnel was released on March 18, 1977. The Report includes a transmittal letter to Mayor Beame, in which the MMAB states that, "The report identifies five major priorities which together constitute a course of action that the Board feels would yield significant improvements in the City's personnel system".

We have studied the MMAB description of the City's current personnel system and its list of priorities and recommendations for improvement in the "personnel system". We believe many of the MMAB proposals, particularly those recommending management development programs and simplification of the City's personnel classification system, are well stated and deserving of serious consideration. However, our analysis reveals that certain of the MMAB proposals are based upon mistakes of fact and erroneous assumptions. We comment primarily upon those recommendations which propose revisions in the New York City Collective Bargaining Law (NYCCBL), the State Taylor Law, the Civil Service Law, and the manner of conducting City labor relations.
We believe that these comments on the MMAB's errors of fact and assumption would not have been necessary had the MMAB followed one of its own suggestions for joint discussion as a means for promoting joint action. In the "Foreword" to its Report, the MMAB states:

To achieve good labor relations, both strong unions and strong management are needed, each articulating their interests and negotiating their differences. As in the private sector, we would expect that those Report proposals which affect organized labor will result in a process of discussion and negotiation between unions and management, from which a common course of action to improve City government will emerge.

This statement endorses the process of consultation among representatives of labor, management and the public for the purpose of achieving sound labor relations in the City. This process is a premise upon which the NYCCBL is based and upon which the statute is administered by the BCB. Yet, no member or representative of the MMAB's Personnel Task Force consulted with the City, Labor or Impartial Members of the BCB, nor with the professional staff of OCB; all we received was a perfunctory request for a copy of the NYCCBL, a Digest of Board Decisions and the Annual Report of OCB. We detail below the attempts of the Impartial Members of the Board of Collective Bargaining (BCB) to cooperate and work with the members of the Personnel Task Force of the MMAB. Those attempts were neither followed up nor encouraged, nor even acknowledged by the Personnel Task Force or the MMAB.
On September 16, 1976, a confidential copy of the "Final Draft" of the Mayor's Management Advisory Board's Personnel Task Force Report, dated September 9, 1976, was given to Arvid Anderson, Chairman of the Office of Collective Bargaining (OCB), by Lawrence Lachman, Co-Chairman of the Personnel Task Force. Mr. Lachman invited Chairman Anderson and the staff of OCB to comment on Task Force Report, with the request that the Draft not be shown at that time to the City and Labor members of the Board of Collective Bargaining.

Mr. Anderson's written response to that invitation, dated September 23, 1976 and attached hereto, stated that:

[A]ny response from the OCB dealing with possible changes in the structure of the agency should come from the full tripartite Board of Collective Bargaining because the tripartite approach is the fundamental principle upon which the New York City Collective Bargaining Law and its administration has been based.

Mr. Anderson and the Impartial Members of the Board informed Mr. Lachman that they would reserve further comment on the Task Force recommendations until the full Board of Collective Bargaining was afforded the opportunity to examine and discuss the suggested proposals. This request was supported by Mr. Harry Van Arsdale, Jr., a Labor Member of the BCB and a member of the MMAB, the parent unit of the Personnel Task Force.

Mr. Anderson's letter also indicated that he and the Impartial Members found significant erroneous assumptions and errors of fact in the Task Force Draft Report, which, in their opinion, affected the Task Force recommendations.
Specifically, Mr. Anderson pointed out such errors in the Task Force's discussion of the following subjects: the criterion of ability to pay; the practical impact clause of the NYCCBL; salaries of skilled tradesmen under §220 of the State Labor Law; and determination of managerial status under the NYCCBL and the Taylor Law.

Having received no response to that request, Mr. Anderson on October 20, 1976 again wrote to Mr. Lachman suggesting that all the Members of the BCB be afforded the opportunity to review the Task Force Draft Report. In addition, Mr. Anderson enclosed several prior public statements by the Impartial Members of the BCB and by himself, as well as other public documents which relate to some of the matters raised in the Draft Report. There has been no response to that letter or to the documents. (Appendix A includes the letters sent to Mr. Lachman and lists the documents forwarded to him).

The issues raised in the Report concerning the structure of the BCB, the employer's budget processes and its ability to pay, and the practical impact decisions of the BCB have previously been the subject of study or comment by other groups, including the Second Taylor Committee, which under legislative mandate required the submission of a plan by the Mayor of the City of New York to the Legislature for the modification of the NYCCBL to make it substantially equivalent with the Taylor Law with respect to finality of its impasse procedures. These "problems" and related matters were raised in a City Club report, "A More Productive Work Force," in 1972 and commented
upon comprehensively in a formal statement by the OCB Chairman on behalf of the BCB. Similar "problems" were dealt with in a Report by the City Charter Commission in 1975. In all instances, comprehensive analysis, complete with documentation, on those comments or reports were prepared by the OCB. Our documented analyses were made available to the City Administration, the Office of Labor Relations, the Municipal Labor Committee, the press and, as stated above, to the MMAB's Personnel Task Force. The Personnel Task Force apparently failed to consider or simply ignored our prior analyses. The analyses which were transmitted to the Personnel Task Force deserve objective review in any appraisal of the MMAB's recommendations.

Our evaluation of the MMAB's Report groups proposals made in the Report under headings which emphasize those that would have the greatest impact on City labor relations.
1. Restructure the Board of Collective Bargaining

The MMAB states on page 55 of Personnel, "Problem: The structure of the Board of Collective Bargaining (BCB) needs further clarification."

We are puzzled by the use of the terms "problem" and "clarification" with reference to BCB structure. Because the errors of fact and assumption upon which suggested "clarification" is based typify the MMAB's misunderstanding of the NYCCBL and the role of the OCB in the City's labor relations, we feel it is important to begin our analysis with a review of this particular recommendation.

Even a cursory reading of the Report reveals that what is actually meant by "clarification" is that the BCB ought to be restructured because the composition of the BCB differs from the structure of the State's Public Employment Relations Board (PERB), and "does not make clear the superiority of the public interest." The MMAB's explanation for such a conclusion is clearly garnered from the notions advanced by the City Club in its November 1972 publication entitled "A More Productive Work Force" and the undated "A More Effective Municipal Labor Policy," as revealed by the following comparison of excerpts from the Report and from City Club publications:

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Although the function of PERB and BCB are the same, their structures are very different. PERB is composed of three members appointed by the Governor with the advice and consent of the Senate 'from persons representative of the public.' BCB, on the other hand, consists of seven members, two 'city members' appointed by the Mayor, two 'labor members' designated by the Municipal Labor Committee, and three 'impartial members' elected by unanimous vote of the four city and union representatives.

City Club Publications

p. 8 A More Productive Work Force

While OCB has been held by PERB to be 'substantially equivalent' there are some important differences.... PERB consists of three members appointed by the Governor with advice and consent of the Senate 'from persons representative of the public.' OCB consists of seven members, two 'city members' appointed by the Mayor, two 'labor members' designated by the Municipal Labor Committee (an organization of unions representing city employees subject to OCB) and three 'impartial members' elected by unanimous vote of the other four members.

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While BCB is currently based on a concept which assumes the primacy of (labor and management) adversaries, PERB's structure assumes the primacy of the public interest.

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It is important to note that while these three [impartial BCB] members are sometimes referred to as 'public members,' they are not. They are three persons who are acceptable to union and management representatives.

The misconception that the BCB does not reflect the public interest, and that the agency's structure is based on an assumption of the primacy of the adversaries, reflects a basic misunderstanding...
of the concept of a tripartite Board. A brief review of the origins of the OCB, and of decisions rendered by the BCB and by neutrals appointed by the BCB to resolve disputes, reveals that the OCB, the BCB and the neutrals on its register have in fact acted and continue to act in the public interest.

Prior to the establishment of the OCB, questions of union representation, grievances and disputes over new contracts were handled by the New York City Department of Labor, an arm of the Office of the Mayor. In 1965, Mayor Robert F. Wagner established a panel, made up of representatives of his office union leaders and impartial labor experts. The latter group included Saul Wallen, President of the New York Urban Coalition; Vern Countryman, Professor of Law, Harvard University; Peter Seitz, Esq., nationally prominent labor arbitrator; and the Rev. Philip A. Carey, Professor at the Xavier Institute of Industrial Relations. The panel conducted discussions under the auspices of the Labor Management Institute of the American Arbitration Association, and the talks continued after Mayor John V. Lindsay took office. Participants in the panel's discussion also included representatives of the City and of the municipal labor unions.

The result of these discussions and deliberations was a written agreement, dated March 31, 1966, which served as the basis for the NYCCBL, passed by the City Council and implemented by the Mayor's Executive Order No. 52, in 1967.
The principle which guided the participants in the formulation of the 1966 written agreement was stated by the public members, in their preamble to the agreement, as follows:

Underlying the parties' agreement on this Memorandum is their commitment to the philosophy and practice of the peaceful settlement of disputes in order to prevent strikes or other interruptions of service. The procedures set forth herein are designed to accomplish this result.

Commenting on the essence of the proposals, the public members stated:

One of the greatest merits of the document is that although it is the product of agreement between the City and the representatives of the employee organizations, it is to be embodied in a City law. The parties themselves have created a structure for the orderly conduct of their relationship. If they fail to adhere faithfully to its procedures, if they reject fact-finding recommendations, they imperil the continued existence of the Memorandum and forfeit the benefits flowing from it. If this occurs the inevitable result will be the replacement of this collective bargaining system by a more coercive and less democratic method of fixing the terms and conditions of public employment.

The MMAB makes the unsupported charge that the BCB does not accord primacy to the public interest. This merely echoes a similarly unsupported charge made by the City Club in 1972.
On December 7, 1972, Donald B. Straus, then President of the Research Institute of the American Arbitration Association and President in 1965 of the American Arbitration Association when it was requested by the Mayor to conduct the discussion which led to the above-noted 1966 written agreement, appeared before the Manpower Committee of the City Club of New York and stated:

I would now like to take exception to the characterization of the differences between OCB and PERB on page 8 of the report -- technically, the differences between a 'tripartite' board and an all public board. Both techniques are well known in the field of collective bargaining and both have achieved successes as well as having sustained failures over the years. But to say that one 'accepts the concept of the primacy of the adversaries' and that the other 'assumes the primacy of the public interest' is a highly editorialized and incendiary choice of words which serves only to confuse the issue. The purpose of collective bargaining is to develop a working contract between management and labor by agreement. It is the extension of democracy to the work place, a way of giving workers a voice in legislating the laws and conditions of their employment. It was the view of the all-public panel appointed to develop this program in 1966 that a tripartite board would best establish the conditions for peaceful settlement of disputes in New York City. This panel held several constructive discussions with distinguished members of the Governor's Task Force who were simultaneously drawing up the outlines of the so-called 'Taylor Law' establishing PERB, and out of these discussions emerged a conviction, shared by Saul Wallen and his colleagues, that New York City required special procedures.

*   *   *

*   *   *
There was no self-delusion that the results would be totally strike-free, nor realistically could any device developed within human ingenuity be expected to produce such a result. In my view, based on long discussions with the panel, it was their philosophy that the procedure they suggested was the best one they could devise 'in the public interest'. It is of course your task here to judge whether or not this is true. But to start out with wrong assumptions regarding the initial intent of the authors of this program will, I believe, lead you toward false conclusions.

I believe that your notion that a tripartite board is less concerned with the public interest than an all public board has led you into a further false conclusion that the public-minded quality of fact-finders, mediators, and arbitrators on the registers of the former are less well developed than those on the registers of the latter. I know something about the procedures of both agencies, and also about the qualifications of the neutrals who serve under both systems. I do not believe that your initial impressions regarding the relative qualifications of the neutrals under these two procedures will stand up under your further explorations.

On December 8, 1972, Arvid Anderson, Chairman of OCB, testified before the Manpower Committee of the City Club on behalf of the Impartial Members of the BCB. Addressing himself to the same City Club allegations on which Mr. Straus commented, Mr. Anderson stated:

The paper [City Club Report] concedes that PERB has held the NYCCBL to be 'substantially equivalent' to the Taylor Law (as is required), but states there nevertheless are important differences. The paper asserts that the OCB
accepts the primacy of adversaries, whereas PERB assumes the primacy of the public interest. This, it is said, is indicated by differences in the composition of the two boards, differences in their approaches and differences in the statutory procedures of unit determination and for the final resolution of contract disputes.

If these statements were correct, one might well wonder how PERB, and the State Legislature, to which it reported its conclusions, possibly could find the NYCCBL 'substantially equivalent' to the Taylor Law. Analysis will show, in fact, that the purported differences are non-existent or without material significance.

PERB is composed of three members appointed by the Governor. The OCB, as demonstrated by its legislative history and the statutory declaration of policy ($1173-2.0), was established as an 'impartial and independent' body. Its membership consists of two City representatives appointed by the Mayor, two labor representatives designated by the Municipal Labor Committee, a federation of public employee organizations, and three Impartial members unanimously elected by the City and Labor representatives (City Charter, §1171).

* * *

The use of tripartite bodies long has been a common, accepted and established procedure in labor relations. To most people, a forum selected bilaterally is considered at least as neutral as one designated unilaterally by one of the partes.

To suggest that the impartial members, or the city and labor members who serve without compensation from the City and OCB, do not have the public
interest foremost is an opinion without basis in fact. Almost all of
the Board of Collective Bargaining
decisions for the past five years have
been unanimous or without dissent, and
such a record certainly does not
suggest an 'antagonist and adversary'
procedure without regard to the public
interest. As a measure of the public
interest, it is significant that [Eric]
Schmertz and [Walter] Eisenberg [then,
as now, impartial members of the BCB]
who, along with Professor Matthew Kelly
of Cornell University, made impasse
panel recommendations for the resolu-
tion of the police, fire and sanitation
dispute last year, adopted as the criteria
for wage determinations the twin concepts
of cost of living and productivity as
the appropriate measurement for increases
and changes in city salaries and working
conditions. These recommendations were
made some six months before the wage
guidelines were introduced by the Pres-
ident which, you are all aware, are based
primarily on cost of living and produc-
tivity. The recommendations of the
impartial members of the Board, with
minor modifications, subsequently
became the basis for a settlement by
the parties the terms of which were
approved in due course by the Pay Board.

I make no argument that the New
York City Law could not be administered
by an all public board, but I submit
that the record to date is that the
present structure has been and is con-
cerned with the public interest.

Similarly, the OCB procedure of
establishing registers of mutually
approved mediators, fact-finders and
arbitrators is the quintessence of
neutrality. The OCB consistently has
deprecated place on its registers
individuals who represent either labor
or management in the public or private
sectors.
The calibre of the neutrals on the OCB registers is outstanding, comparing favorably with any similar registers in the nation, as to experience, expertise and integrity. Moreover, the use of registers consisting of neutrals acceptable both to management and labor results in an acceptability of recommendations and decisions not present where the neutrals are not so screened.

*   *   *

The Paper's statements that the NYCCBL differs from the Taylor Law in its failure to recognize the primacy of the public interest, and in its assumption that there are no differences between the public and private sectors, clearly have no basis in fact. The public interest is expressly recognized in the statutory provisions for the determination of bargaining units and in the standards governing the factors to be considered in impasse proceedings. Additionally, the OCB rules require the filing of all collective agreements and provide that the filed copies shall constitute public records available for inspection.

Nor is the OCB unaware of the distinctions between the public and private sectors. Decisions of the Board of Collective Bargaining have pointed out, and relied upon, those distinctions where pertinent. See, for example, Matter of Civil Service Bar Association, Decision No. B-9-69; Matter of Association of Building Inspectors, Decision No. B-4-71; Matter of District 1, M.E.B.A., Decision No. B-1-72.
The MMAB failed to define its conception of "the public interest." There are established standards of public policy of the State of New York and the City of New York on this subject. The New York State Legislature has stated that the public policy of the State is:

[(T)o promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted 2/ operations and functions of government.]

The City Council has declared the public policy of the City of New York to be:

[(T)o favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations. 3/]

When BCB operations are measured by these standards, it is clear that it has acted in "the public interest."

That the tripartite BCB, implementing the provisions of the NYCCBL, has promoted "harmonious and cooperative relationships between government and its employees" and has achieved "the orderly and uninterrupted operations and functions of government" is evident from the history of virtually no strikes by

2/ Civil Service Law §200
3/ New York City Administrative Code §1173-2.0.
municipal employees in over five years since the NYCCBL was made substantially equivalent to the State law by enactment of the finality provisions of the NYCCBL. 4/ There have been three significant work stoppages by municipal employees in that time: one five and half-hour work stoppage by firefighters; a three-day wildcat stoppage by sanitation workers; and the recent four-day municipal hospital stoppage. The latter two, the sanitation and hospital stoppages, did not involve disputes over the negotiation of a new contract, but were the responses of the employees involved to the City's laying off of fellow employees in their respective departments. That more work stoppages over similar unilateral acts by management did not occur is due, in our opinion, to the practical impact clause of the NYCCBL, and the mechanism developed by BCB decisions for dealing with such impact, a matter developed in detail below.

The generally harmonious and cooperative relationship existing between the City and its employees is further evidenced by the wage deferral agreements and productivity agreements negotiated between the City and almost all of the municipal labor unions during the period of fiscal crisis. Of great significance is the unions' cooperation in bringing about the commitment of up to $3.7 billion of pension funds to the purchase of municipal securities. We submit that without this ten-year history of labor-

4/ NYCCBL §1173-7.0(c)(4)(f).
management consultation in the resolution of labor disputes --
the premise upon which the BCB was founded -- the attainment of
such cooperation in the resolution of the fiscal crisis would
have been more difficult.

Implementation of the statutory criteria of the NYCCBL, enacted by the City Council in the public interest, by the
BCB and by neutrals appointed by the Board to resolve disputes, demonstrates that the BCB and the professional neutrals involved
have indeed acted in the interest of the health, safety and security
of the citizens of New York. For example, Impasse Panel recommendations rendered in the police pay parity dispute and in the police
duty chart dispute, unanimously affirmed by the BCB, were both
acclaimed by the City Administration as examples of responsible
municipal labor relations and in the best interests of the public.
A more detailed discussion of the decisions of neutrals and of the
BCB will follow in this memorandum.

Additional evidence of the Board's unwavering commitment
to action in the public interest is to be found in the fact
that the vast majority of BCB decisions have been unanimous or
rendered without dissent by the City and Labor members of the
Board. When challenged in Article 78 proceedings, the courts
of New York have upheld the Board's decisions in all cases except

7/ Board Decision No. B-12-76.
one, which involved a civil service question and has been resolved by the parties in lieu of an appeal.

Seemingly, the MMAB objects, without stated reason, to the very concept of a tripartite Board. PERB repeatedly has stated that "as an alternative to a board whose members are all representative of the public, a tripartite board may be established [by local governments]." 8/ Section 212 of the Taylor Law requires that the local procedures and boards be approved by PERB. However, the State Legislature, recognizing the uniqueness of labor relations in New York City, provided, in §212, that the establishment of the OCB by the City of New York does not require prior approval by PERB. In addition, §212 provides, in substance, that the NYCCBL, as enacted by the City Council, is in full force and effect until there is a determination by the Supreme Court, New York County, that "the provisions and procedures, or the continuing implementation thereof" are not in substantial equivalence with the State law, practice and procedures. "there has been no such determination to-date. Indeed, PERB has noted the unique labor relations problems in New York City and the expertise of the BCB in dealing with them."

8/ Matter of County of Oswego, 1 PERB ¶302, p. 3009; Matter of County of Tompkins, 1 PERB ¶308, p. 3017; Matter of City of Auburn 1 PERB ¶312, p. 3021.

9/ Matter of Queensboro Public Library, 8 PERB ¶3060, p. 3108; Matter of Patrolmen's Benevolent Assn., 9 PERB ¶3031, p. 3055; Matter of City of New York, 10 PERB ¶3003, p. 3006.
The use of tripartite bodies is not novel. Section 655 of the State Labor Law authorizes the Industrial Commissioner to appoint tripartite minimum wage boards.

Tripartite arbitration "has been widely used in both labor and commercial arbitrations," and has been upheld by the courts. 10/

Tripartite adjustment boards are provided for in the Railway Labor Act, and have been upheld as constitutional. 11/

Section 302(c) of the Taft-Hartley Act (29 U.S. Code §186c) expressly provides for tripartite resolution of disputes concerning the administration of employee welfare funds. Similarly, §13-g(2) of the New York Workmen's Compensation Law requires arbitration of disputes concerning the value of medical services rendered. The arbitration board, by statute, consists of three physicians, one chosen by the president of the county medical society, one designated by the insurance carrier and one named by the Chairman of the Workmen's Compensation Board.

The New York City Health and Hospital Corporation Act provides for a three member Personnel Review Board. 12/ One of the three members is designated by the Municipal Labor Committee; one member is appointed by the Corporation; and these two designees select the third member, who is the chairman of the board.

12/ Unconsolidated Laws §7390.
In 1974, The Taylor Law was amended to provide for the resolution of collective bargaining impasses between police officers and firefighters and their employers, outside the City of New York, by a public arbitration panel. The statute provides, "The public arbitration panel shall consist of one member appointed by the public employer, one member appointed by the employee organization and one public member appointed jointly by the public employer and employee organization...." We would remind the MMAB that a built-in check on the actions of the BCB exists by reason of the fact that every year the election and/or retention of one of the three impartial members comes up for approval by the Mayor and the MLC. The Chairman is now in the second year of his fourth term on the BCB; one Impartial Member is presently in the first year of his fourth term on the BCB; the other Impartial Member is in the third year of his third term on the Board. Indeed, any discussion of the BCB's consistent pattern of actions in the public interest would not be complete without recognition of each BCB member's professional credentials and personal dedication to public service, which we detail in Appendix B.

We stated in the Introduction to this Analysis that the MMAB's recommendations for revision of the NYCCBL and the restructuring of the BCB were based upon mistakes of fact and erroneous

13/ Civil Service Law §209(4).
assumptions. Among the clear indications of faulty MMAB research into the provisions of the NYCCBL, and of the BCB's administration of this statute, is the following statement:

Within OCB, the Board of Collective Bargaining (BCB) performs the following functions for unions covered by New York City's Collective Bargaining Law: 1) makes final determinations regarding the scope of negotiability and the arbitrability of grievances; 2) issues advisory opinions interpreting the City's Collective Bargaining Law; and 3) has the power of compulsory arbitration of collective bargaining disputes. PERB, OCB's State counterpart, performs these same functions for those unions which are not covered by the City's Collective Bargaining Law (e.g., the Transit Authority and the Board of Education). 14/

We cannot seriously believe that the MMAB means to suggest that the BCB or PERB performs any functions for unions. It is an evident example of poor draftsmanship of the Report. Obviously, neither the BCB, nor PERB, performs any functions for unions covered by the applicable law. The BCB determines questions of negotiability, arbitrability and impasse at the request of the public employer and/or the employee representative; it is not an agent, as the Report implies, of any union. Further, the BCB rarely issues advisory opinions interpreting the City's collective bargaining law. To state that the BCB has the power of compulsory arbitration is an incomplete description of the Board's authority to resolve contract disputes. When an impasse in collective

14/ Personnel, pp. 38-39.
bargaining is alleged by the employer and/or the employee representative to have developed, the Board determines whether indeed an impasse exists. If so, the Board appoints an impasse panel, which considers the issues, evidence and arguments presented by both parties and issues a report and recommendations; if the panel's report and recommendations is appealed, the Board reviews it to determine whether the panel adhered to enumerated statutory criteria. The Board may affirm or modify the panel's recommendations in whole or in part. The Board may also set aside the recommendations of an impasse panel in whole or in part if it finds that the rights of a party have been prejudiced on any of statutorily enumerated grounds. It is the final determination of the Board which becomes binding on the parties, and constitutes an award within the meaning of Article 75 of the CPLR. This latter provision, commonly referred to as the finality clause of the NYCCBL, was adopted by the City Council as a result of the mandate of the State Legislature that the NYCCBL shall be substantially equivalent to the Taylor Law.

The MMAB also makes the erroneous assertion that PERB determines questions of arbitrability.

It is against a backdrop of erroneous statements such as these that the MMAB describes three alternate ways to respond to the BCB "problem" and states that each of the alternatives "would

\[15/\] The procedures described are set forth in §1173-7.0(c) of the NYCCBL.

\[16/\] See, 1969 Report of the Mayor to the State Legislature, attached hereto.
work to redress the existing imbalance in the [BCB's] administration of municipal labor relations.\footnote{17/} The MMAB describes the first alternative as follows:

One suggestion which is periodically made is that OCB be eliminated and the City's labor relations returned to the jurisdiction of the State Public Employee Relations Board (PERB). Advocates of this alternative point out that the City would save close to $1 million through the elimination of OCB. At the same time, however, it would seem that the City's labor relations are sufficiently big and complex to warrant the existence of a board whose sole purpose is to respond to their problems.\footnote{18/}

In this option, unidentified "advocates" of the elimination of OCB are said to argue that such action would save the City close to $1 million. The Expense Budget for Fiscal Year 1977 -- a public document -- lists the maximum authorized budget of OCB as $746,773.\footnote{19/} Included in this amount is $53,195 which is paid by the Municipal Labor Committee (MLC). Thus, the elimination of OCB would save the City, at the most, $693,578. This amount assumes the total utilization of budgeted funds, which is highly unlikely because the authorized budget includes items for which funds are not expended (e.g., vacant titles).

In addition, a complete analysis of the effects of the elimination of OCB should include an estimate of the related costs to the City of any such action, including the added expense

\footnote{17/} Personnel, p. 55.  
\footnote{18/} Ibid.  
\footnote{19/} We would also point out that the MMAB incorrectly states, on page 36, that the Office of Labor Relations (which, since March 7, 1977, is officially the Office of Municipal Labor Relations) has a budget of $750,000. The Expense Budget for Fiscal Year 1977 lists OMLR's authorized budget as $1,133,797.
of litigating the arbitrability of grievances before a court, rather than through the BCB.

Commendably, the MMAB recognizes that the City's labor relations are sufficiently complex to warrant the existence of a separate board to administer the problems arising between the City and municipal labor unions. We suggest that the MMAB might also have mentioned the efforts by the City, the MLC, PERB and the OCB to return jurisdiction over improper practices to the OCB. Legislation which would have alleviated problems that have arisen because of overlapping jurisdiction over certain issues between PERB and OCB was passed in the last session of the Legislature, but, despite strong support from the City, the MLC and PERB, was vetoed by the Governor. The OCB needs the support of all interested parties to enact a bill which the Governor will sign.

The MMAB states the second alternative to be:

A second option sometimes advocated is that BCB and its current structure be retained, but that steps be taken to restore and strengthen BCB's bipartisan nature. This approach would involve actions such as establishing an ongoing liaison function between the Mayor and the City's representatives to insure that these representatives were indeed acting in management's interests. 20/

This option, to strengthen the bipartisan nature of BCB by improving the liaison between the Mayor and the City members of the BCB, is a proposal which we have strongly advocated in the past. On numerous occasions we have urged the Office of Municipal Labor Relations and the Mayor's Office to confer regularly with the City members on matters before the BCB; just as we have also urged

20/ Personnel, p.56.
members of the MLC to confer with the Labor members of the Board. Indeed, all interested parties are furnished with a copy of the Board's agenda before the BCB meetings. The MMAB gives no reason for not endorsing this option; it merely asserts its preference for another option.

The third alternative is stated in these terms:

The third and probably most desirable option is that the City retain OCB, but that BCB's structure be changed to resemble somewhat more closely that of its State counterpart. While BCB is currently based on a concept which assumes the primacy of (labor and management) adversaries, PERB's structure assumes the primacy of the public interest. Its three members are appointed by the Governor with the advice and consent of the Senate 'from persons representative of the public.' Thus, they are different in nature even from BCB's 'public members,' who are in fact persons who are acceptable to the Board's union and management representatives.

It therefore seems that BCB's structure could be modified to serve better the interests of the City as a whole. This could be achieved by selecting only one union and one management representative, and having the remaining OCB members chosen to represent the public. Public members would be appointed by the Mayor in accordance with specific criteria to insure their impartiality (e.g., that they not be currently professionally involved in New York City's labor relations system). These members would be nominated by an advisory committee consisting of representatives of organized labor and other groups. 21/

This option, endorsed by the MMAB without any stated supporting reason, as "probably [the] most desirable option," would restructure the BCB and alter the manner of selection and appointment of its members. The MMAB, in seeking to make the BCB more

21/ Ibid.
like PERB, recommends that the public members of the restructured Board be appointed by the Mayor in accordance with criteria to insure their impartiality, specifying as a criterion that the impartial members "not be currently professionally involved in New York City's labor relations system." It is beyond comprehension why persons professionally qualified should not be considered for Board membership. We think it obvious that persons experienced in this complex field, as acknowledged by the MMAB, could serve effectively on a BCB, whatever its structure may be. We also observe that no such criterion is used in the nomination and appointment of the members of PERB. For example, Ida Klaus, a member of PERB, for many years has been identified as a professional involved in New York City labor relations. Her professional involvement includes service as General Counsel to the New York City Department of Labor and as Director of Staff Relations for the New York City Board of Education.

As further grounds for questioning whether the BCB proposed by the MMAB would be more like PERB, we would point out that the members of PERB are nominated by the Governor and appointed upon the consent of the State Senate to six-year terms. The non-professionally involved members of the MMAB's restructured BCB would be appointed by the Mayor after nomination by "an advisory committee consisting of representatives of organized labor and other groups," which remain unidentified. Would the City Council be able to review the Mayor's choice? What would be the length of the term of the non-professionally involved members? Or, as the MMAB seemingly suggests, would such members serve only at the pleasure of the Mayor?

22/ Supra, pages 36 and 37.
We do recognize that a tripartite BCB can have various combinations of membership and that the BCB could have all public members, similar to PERB. However, we do not understand the concept which suggests that persons mutually acceptable to the City and Labor members of the BCB could not or would not act in the public interest. As we have indicated above, the record is otherwise. Moreover, the proposed membership of the BCB described by the MMAB cannot be said to constitute a tripartite board, nor can it be said to be in the public interest. Four members of the new five-member BCB would be selected and appointed by the Mayor. In view of the MMAB's suggestion that everything possible be done to strengthen the position of the Mayor's chief negotiator, the recommendation is not surprising. Indeed, the MMAB, in describing the Mayor's role as an employer, refers to the Mayor as "an adversary of unions." Yet, the MMAB recommends granting to the Mayor the power to appoint four of the five members of the quasi-judicial BCB; a proposal which is manifestly inconsistent with the concept of a truly tripartite and independent Board.

As to the operational practicality of a smaller, five-member Board, we suggest that such a Board would have difficulty functioning effectively because a tripartite board requires that both the sole Labor member and sole City member be in attendance at every Board meeting. Based on our experience, it would be extremely difficult to have persons, particularly those whose careers mark them as citizens of stature, attend every Board meeting.

23/ Personnel, p. 54.
24/ Ibid., p. 37.
In addition, we would question whether a single Labor member could represent the viewpoints of such a large number of employees who are represented by many municipal labor unions, which unions have been known to have diverse positions on issues concerning municipal labor relations.

Summarizing our comments on the MMAB’s proposal to restructure the BCB, we feel it appropriate to recall Chairman Anderson’s closing remarks in his 1972 City Club appearance. Mr. Anderson stated:

It is my opinion that New York City’s pioneering and innovative efforts in the field of public sector labor relations have been constructive; and that our City has, as a result, a labor relations program which will compare favorably with that of any governmental entity in the nation. This is not to say that the system or its administration are perfect or that they cannot be improved. The first step in securing improvement is an understanding of the present system. The second - and more important than any system - is a determination to make collective bargaining in the public service work in the public interest. The OCB is committed to that goal.
2. Deletion of the Practical Impact Clause of the NYCCBL [§1173-4.3(b)] and Elimination of Bargaining on Permissive Subjects of Collective Bargaining.

In the discussion of its fifth priority, "Develop Good Management Systems", the MMAB makes the following recommendation:

An important first step to this goal would be to delete Section 1173-4.3b of the City's collective bargaining law, which extends to unions the permission to bargain on 'practical impact.' In addition, the City should be prohibited from bargaining on those managerial prerogatives which are now deemed 'permissive,' and which are often negotiated although they are not mandatory subjects of collective bargaining. 25/

Again we find that the MMAB's reasoning is not original, but rather is merely another echo of the statements of the City Club, as revealed by a comparison of excerpts from the MMAB Report and from a City Club publication in 1972, "A More Productive Work Force." We have included this comparison in Appendix D.

Thus, a good starting point for our analysis of this MMAB proposal is OCB Chairman Anderson's response, in 1972, to the similar allegations made by the City Club. Mr. Anderson stated:

'Scope of bargaining' is discussed in Part IV of the Paper, ["A More Productive Work Force"] not in Part III dealing with purported differences between State and City law. Yet here there is an important statutory difference. The NYCCBL contains, but the Taylor Law does not, a management rights clause. Parenthetically,
in the private sector, management rights clauses are mandatory subjects of bargaining [NLRB v. American National Insurance Co., 343 U.S. 395]. The NYCCBL's statutory reservation of management rights thus is one of the facts which demonstrate the error of the Paper's statement that the OCB assumes there are no differences between the public and private sectors.

Section 1173-4.3b of the NYCCBL reserves to the public employers covered thereby the right:

'to determine the standards of services to be offered by its agencies; to 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 government operations; determine the methods, means and personnel by which government operations are to be conducted; 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.'

The OCB consistently has held that any subject which infringes upon these reserved management rights is not a mandatory subject of bargaining, i.e., that the public employer is under no duty to negotiate on that subject. (See, e.g., Matter of D.C. 37, Decision No. B-3-69; Matter of Association of Building Inspectors, Decision No. B-4-71; Matter of D.C. 37, Decision No. B-4-69; Matter of D.C. 37, Decision No. B-1-70.)

The OCB has held that the City and other public employers subject to the NYCCBL may voluntarily discuss or negotiate non-mandatory subjects not prohibited by law. Those decisions are predicated upon the self-evident proposition that full and free discussion and airing of problems is the cornerstone of good labor relations. The OCB has made it crystal clear, however, that non-mandatory subjects may be discussed or negotiated only with the employer's consent; that such consent also is a condition
precedent to submission of the subject to an impasse panel; and that if agreement is reached and embodied in a collective bargaining contract, the obligation is contractual and does not transform a voluntary subject into a mandatory subject for purposes of future negotiations (Matter of Social Services Employees Union, Decision No. B-11-68). 26/ 

Section 1173-4.3b of the NYCCBL provides for negotiation on the 'practical impact' which management decisions, such as those involving manning or work load, may have upon employees. Here again, it is submitted, such negotiation is necessary to sound labor relations. The OCB, however, has safeguarded the management rights by holding that the impact must be unreasonably excessive or unduly burdensome as a regular condition of employment, and that issues whether the alleged impact meets that test are determinable by the OCB. (Matter of Uniformed Firefighters Assn., Decision No. B-9-68). This same rationale is set forth in the landmark decision by the PERB in the New Rochelle Federation of Teachers case which cited with approval, New York City decisions.

It is clear, therefore, that the NYCCBL is substantially equivalent to the Taylor Law, as PERB has found, and, in fact, contains a strong management rights clause not found in the Taylor Law. The record is equally clear, contrary to the Paper's statements, that the OCB fully recognizes the distinction between the public and private sectors, and the special importance of the public interest in the former. In practice the City has aggressively asserted its rights under the management prerogative clause in a number of actions before the Board of Collective Bargaining while at the same time it has adopted a realistic bargaining approach to assure that improvements in wages, benefits and working conditions are accompanied, wherever practicable, with improvements in productivity. [Footnote renumbered].

26/ The OCB has upheld the City's contention that under the management rights provision it is not required to negotiate on the following subjects, among others: creation of new positions or titles; provisional appointments; lateral transfers; whether to use departmental or city-wide promotion lists; lay-offs; whether to fill vacant positions; the ratio of supervisory to non-supervisory positions; geographical rotation of employee assignments; establishment of shift hours; establishment of training funds; whether to grant merit increases.
Examining the MMAB's reasons for the elimination of the practical impact clause and for restriction of the scope of bargaining, we again find that the MMAB is proposing major revisions of the NYCCBL based upon erroneous statements of fact and law. The MMAB alleges that management prerogatives, i.e., decisions concerning the operation of government agencies, have gradually been eroded by municipal unions attempting to gain as much control as possible over the work structure of City employees. The broad interpretation given by the BCB to the practical impact clause of the NYCCBL has left, according to the MMAB, few issues relating to the management of the City's workforce under managerial control.

We find this misreading of the record to be particularly ironic, in that the City unions, in a formal statement issued by the MLC on December 9, 1974, have been harshly critical of the BCB for what the MLC terms are extremely narrow and conservative judgments with respect to scope of bargaining issues and practical impact determinations. The MLC statement charged that BCB determinations in these areas rendered the NYCCBL not in substantial equivalence with the Taylor Law.

The MMAB cites no authority nor any BCB decision to support the MMAB's assertions. The fact is that since 1968, the BCB has consistently defined practical impact to mean an unreasonably excessive or unduly burdensome workload as a regular
condition of employment resulting from the exercise, by the em-
ployer, of a managerial prerogative. \(^{27/}\) In addition, the Board
has developed a mechanism which allows management unilaterally
to relieve the practical impact of a managerial decision before
the City is required to bargain on that impact. That is, if a
practical impact is found, the City may act unilaterally to
relieve the impact through the exercise of its reserved rights,
or it may seek to relieve the impact by negotiating changes in
wages, hours and working conditions. If the City does not
expeditiously relieve the impact in one of these ways, or an
impasse is reached, only then will an impasse panel be appointed
and may make recommendations to relieve the impact, including,
but not limited to, recommendations for additional manpower or
changes in workload. \(^{28/}\)

Furthermore, the record shows that of the 12 cases in
which the practical impact of an unilateral action taken by the
City was at issue, the Board held in 10 of those cases that such
action did not cause the workload of employees to become unduly
excessive or unreasonable burdensome as a regular condition of

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\(^{27/}\) Board Decisions Nos. B-9-68; B-1-74; B-7-74; B-13-74;
B-16-74; B-3-75; B-5-75; B-18-75; B-21-75; B-23-75; B-24-75;
B-2-76.

\(^{28/}\) See, for example, Decision No. B-9-68.
employment. The 12 practical impact decisions were issued in virtual unanimity by the City and Labor members of the Board. The City did seek to annul one practical impact determination of the BCB in an Article 78 proceeding, but the Supreme Court, New York County, upheld the BCB decision.

Continuing with its attempt to provide a rationale for the elimination of the practical impact clause and the prohibition of bargaining on permissive subjects, the MMAB recites several examples of restrictions on managerial discretion allegedly attained by municipal unions through the use of the practical impact clause. The restrictions are stated to be:

[T]he class size limit for teachers; the 'two-man patrol car' rule for police; the 'three-man on-a-truck' policy for sanitation workers; the case-load maximum for welfare workers; and the 'buddy-system' for housing employees.

Again, the MMAB misstates facts and the law. The Board of Education is not within the jurisdiction of OCB. Therefore, any contractual limits on class size were not obtained under the aegis of the practical impact clause of

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29/ Board Decisions Nos. B-9-68; B-1-74; B-7-74; B-13-74; B-16-74; B-5-75; B-18-75; B-23-75; B-24-75; B-2-76. (All BCB Decisions are available, upon request, at the Office of Collective Bargaining)


31/ Personnel, p.67
the NYCCBL nor as a result of any scope of bargaining
determination by the BCB. Were the OCB to have jurisdiction
over the Board of Education, our determinations of the bar-
gainability of class size would be governed by the Court of
Appeals decision in West Irondequoit Teacher's Association v.
Helsby. 32/ The Court of Appeals, affirming PERB's deter-
mination of the case, held that the initial determination
of class size was purely a matter of educational policy and
that such a managerial prerogative is not a mandatory subject
of collective bargaining. The Court also upheld PERB's
determination that the impact on the employees of the
exercise of such managerial prerogative is a matter for
mandatory negotiation.

The "two-man patrol car rule for police" is a matter
of a side-letter agreement between the City and the police
unions. The agreement on two-man patrol cars is reflected
in a letter from the Police Commissioner to the President of
the PBA, dated October 3, 1972, which letter was issued
without participation by the OCB in any form. At the con-
clusion of the contract term, when the City decided that it
wished to revoke the side-letter agreement guaranteeing

two-man patrol cars, BCB held that such a manning policy is a permissive subject of bargaining which may be a matter of negotiation only on the mutual consent of the employer and the employee representative.\textsuperscript{33/} The Board also held that if a proposed change in the manning of patrol cars were challenged by the Patrolmen's Benevolent Association as a threat to the safety of police officers, the Board, on the basis of relevant evidence, would determine whether the proposed plan in fact involved a threat to employee safety. If the Board were to find that the proposed plan involved a practical impact upon safety, the parties would be directed to bargain for the alleviation of the threat to the safety of the officers. However, the City was not required to bargain on whether to implement a change in the two-man patrol car policy. The Board only held that the City could be required to bargain on the impact of such a decision. The fact that the City voluntarily chose to bargain on the policy, and did reach a contractual agreement regarding same, did not and would not convert the defined managerial prerogative to a mandatory subject of bargaining. The two-man patrol car policy remains a permissive subject of bargaining and a managerial decision to change it would not turn it into a mandatory subject of bargaining.

The "three-men-on-a-truck" policy for sanitation workers is unfamiliar to us. We have never rendered a

\textsuperscript{33/} Board Decision No. B-5-75.
decision concerning such a policy. If such policy exists, it is not a contractual guarantee for sanitation workers; perhaps it is a policy decision of the Department of Sanitation, relating to loaders and truck drivers.

Specific contractual caseload maximums for welfare workers were once instituted by voluntary agreement between the City and welfare workers. The New York State Commissioner of Social Services has promulgated regulations governing caseload maximums for welfare workers. This matter has never been held to be a mandatory subject of bargaining by the BCB.

We are unaware of what is meant by the "buddy system" for housing employees, in contractual or BCB policy terms.

The MMAB also asserts, without citation of authority, that, "City efforts to improve employee productivity by changing work schedules to put more firemen and policemen on duty during the period when the most fires and crimes occur have been successfully opposed by the unions." If such is the case, it is a matter of negotiated agreement between the City and its employees and not as a result of any action taken by the BCB. The BCB has held34/ that the City, under the management rights clause of the NYCCBL, can institute changes in the duty chart schedules and 24 squad system of police assignment it had earlier agreed to with the PBA under certain conditions. The Board held that the

34/ Board Decision No. B-24-75.
City's right to determine the level of manning required to provide for the public safety included the right to determine starting and finishing times, tours of duty and the number of platoons and their assignment throughout the day; the City was required to bargain with the PBA only on the total number of hours and days worked by employees as well as the length of the work day. This finding was upheld by the Supreme Court, (PBA v. BCB, NYLJ January 2, 1976), in an opinion which affirmed the BCB decision and dismissed completely the PBA challenge to the findings of management prerogative.

We would further point out that the MMAB fails to discuss the consequences of deletion of the practical impact clause and the prohibition of bargaining on matters concededly within managerial discretion. Such actions would leave the NYCCBL not in substantial equivalence with the Taylor Law. Because the NYCCBL is required to be in substantial equivalence with the Taylor Law, the practical impact policy developed by PERB and by judicial interpretation of the Taylor Law 35/ would apply to New York City regardless of the existence of the management rights clause of the NYCCBL. In addition, the Court of Appeals has stated that:

[C]ollective bargaining under the Taylor Law (Civil Service Law, §204, subd.1) has broad scope with respect to the terms and conditions of employment, limited by plain and clear,

35/ See, West Irondequoit Teachers Association v. Helsby, 35 N.Y. 2d 46; City of Albany and Albany Professional Firefighters Association, 7 PERB ¶3142.
rather than express, prohibitions in the statute or decisional law... 36/

Thus, to achieve the objectives sought by the MMAB, an amendment to the Taylor Law, affecting public sector bargaining throughout New York State, would be required.

Moreover, deletion of the practical impact clause and prohibition of bargaining on permissive subjects would eventually result in detriment to the City. For example, in an effort to achieve cost savings in municipal government, the City and the municipal unions have established joint Labor-Management Productivity Committees in each municipal agency. 37/ The cost savings achieved by the joint committee are to be applied to pay the cost-of-living adjustments (COLA), as agreed in the June 30, 1976 Memorandum of Interim Understanding, signed by the City and most municipal labor unions. As stated in Administrative Order No. 28, issued by First Deputy Mayor John E. Zuccotti, the productivity program is "[To] be the result of joint Labor/Management deliberation and agreement in each agency. It is to be achieved without adversely affecting agency services." The Administrative Order suggests that costs savings may be achieved in the following areas:

Personnel reductions; overtime reduction; scheduling to reduce special differentials for night-work, week-end work or holiday work; better use of facilities such as consolidation or closing earlier; other OTPS [other than personnel services]

36/ Syracuse Teacher's Association v. Board of Education 35 N.Y. 2d 743.

37/ See Administrative Order No. 28, attached hereto.
savings in the areas of technology, inventory control, etc.; better services in revenue generating areas such as licenses, fires, rentals, etc.; and reduction in contracting out for work that could be done by City employees.

Most of the suggested areas are matters which are permissive subjects of bargaining under the NYCCBL. The MMAB recommends that the City be prohibited from bargaining on these subjects; that the City act unilaterally in these areas. It is our opinion that greater productivity will be achieved more expeditiously and with much less disruption of the individual agency's business through the proposed joint labor-management effort than if the cost-saving proposals were imposed unilaterally by management upon employees, as the MMAB recommends.38/

Indeed, the greatest danger which could result from the MMAB's proposal to eliminate the practical impact clause of the NYCCBL and restrict the scope of bargaining is the loss of flexibility the present practical impact mechanism and scope of bargaining structure affords the City. It can bargain on subjects that are within its managerial discretion

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38/ We also note that the PBA efforts to annul the above-noted BCB determination of the negotiability and non-negotiability of issues concerning changes in duty chart schedules and the 24 squad system of police (Decision No. B-24-75) before PERB and in Supreme Court, New York County were unsuccessful because both forums found, inter alia, that as the NYCCBL is substantially equivalent to the Taylor Law, an interpretation of the NYCCBL by the agency charged with administering that statute is to be accepted if not unreasonable. (See, City of New York and PBA, 9 PERB ¶ 3031; PBA v BCB, NYLJ, January 2, 1976, p.6). We would suggest that if the NYCCBL were not substantially equivalent to the Taylor Law, the City's efforts in those forums to have the BCB decision upheld would not have been successful.
when the desired result requires labor input and cooperation, e.g., the productivity agreement. This is an option management has; the City is not required to negotiate on such permissive subjects of bargaining. Even if it does bargain on such issues and no agreement is reached, there is no requirement that such issues be submitted to an impasse panel.

In its recommended personnel system for New York City, the MMAB states that the third necessary priority is, "Develop a Cost-Sensitive Framework for Collective Bargaining."

The MMAB declares that three major actions must be taken to develop its framework:

1) Acceptance of 'ability to pay' as a legitimate criterion for collective bargaining in the public sector;
2) development of a collective bargaining arena that covers all public agencies serving New York City, i.e., that includes but is not limited to the municipal government and its employees; and
3) reform of the 'prevailing wage rate' system.39/

We will analyze the MMAB's call for a new collective bargaining framework in the order of the "major actions" the MMAB has deemed is required.

A) Ability to Pay

The MMAB alleges that another weakness in the City's labor relations system is that, "'[A]bility to pay' has been inadequately recognized as a valid criterion for negotiations."40/

The MMAB, without giving illustrations and without citing any authority, argues:

39/ Personnel, p. 57
The historic unwillingness of arbitrators to recognize ability to pay as a valid basis for settlements is particularly difficult given the City's fiscal crisis and its commitment to the use of arbitration as the 'court of last resort' in labor settlements. In the private sector, 'ability to pay' has also frequently been excluded as a legitimate variable in collective bargaining. But the rationale there is that if management cannot meet justified increases in labor costs (e.g., by raising prices), it has the option of going out of business. Obviously, municipal government -- as the provider of vitally needed public services -- does not have the same option of closing down its operation. In the past, however, the City was able to meet the increased costs of labor settlements because its tax base was increasing or it had the option to either raise taxes or borrow funds. But none of these alternatives is feasible in New York City today, when the tax base is unlikely to increase, raising taxes would be counterproductive, and the City is no longer able to borrow funds. 41/

On the basis of those misstatements of fact and law, the MMAB suggests that:

A collective bargaining process is needed in which the municipality's ability to pay salary increases is included as a relevant criterion along with other legitimate factors such as inflation and the appropriateness of salary scales. Even in the midst of crisis, collective bargaining in good faith should take place, but the City's ability to pay for the costs of settlements should assume a central role in these and future negotiations.

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40/ Personnel, p. 38
41/ Ibid.
and in third party proceedings. Unions and management cannot be permitted to bargain for increases which will put the City into a deficit situation. In the short run, given the virtual ceiling on the City's revenue raising capability, the application of the ability to pay criterion will mean that wage and benefit increases will only be possible where offsetting cost savings can be demonstrated. 42/

These statements are contrary to the record of bargaining in the public and private sector. The employer's ability to pay wage increases obviously has great relevance in contract negotiations in both the public and private sectors. And although we believe the MMAB's comments on private sector negotiations to be an altogether superficial review and contrary to the record of consideration of ability and inability to pay in private sector negotiations, which can easily be documented, our primary concern is to analyze the MMAB's comments on public sector contract negotiations. Our experience has been that City and public employee union negotiators regularly argue and document ability and inability to pay, and repeat and amplify such arguments and documentation when they present cost-occasioning issues for consideration and recommendation by impasse panels.

Indeed, contrary to the beliefs of the MMAB, the record shows that factfinders designated by the BCB to resolve collective bargaining impasses have considered the City's ability to pay in every impasse panel proceeding in which wage or other cost factors have been at issue. 43/

42/ Personnel, p. 57
43/ See Appendix F containing excerpts from Impasse Panel Reports and Recommendations.
The NYCCBL sets forth the factors an impasse panel must consider in making its recommendations for terms of settlement. Section 1173-7.0(c)(3)(b) of the statute states the factors to be:

(1) 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;

(2) 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;

(3) changes in the average consumer prices for goods and services, commonly known as the cost of living;

(4) the interest and welfare of the public;

(5) 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.

Although the words "ability to pay" are not explicitly stated in the statute, factfinders have given every attention to the ability to pay criterion under the statutorily mandated considerations of "the interest and welfare of the public." For example, a one-member impasse panel, in its Report and Recommendations issued November 13, 1974, stated:
Moreover, 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 and welfare 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. 44/

The panel, in the impasse proceedings involving the Licensed Practical Nurses, stated:

The City has been going through a steadily worsening financial situation, resulting in part from precisely the same causes as have produced the Association's rationale for the salary proposals here. It is appropriate to take into account, in weighing the proposals of the parties and in developing a wage structure to recommend to the parties, the very troubled economic condition of the City, just as it is appropriate to take into account the effect of inflationary pressures on the pay rates of the City's employees. 45/

In addition, the well publicized impasse panel report in the duty chart schedule dispute between the City and the Patrolmen's Benevolent Association 46/ recognized that, "[I]n a time of critical financial distress for the City.... The urgent needs of the [Police] Department for increased street coverage ... [must] be given priority."

The words "ability to pay" were not expressly included as a statutory criterion when §1173-7.0(c)(3)(b) of the NYCCBL was drafted because it was felt by the tripartite panel designated to draft the statute that the subject was covered under

44/ Community Action for Legal Services, Inc. and Legal Services Staff Association, t-110-74.


46/ City of New York and Patrolmen's Benevolent Association, B-12-76. This decision affirmed the Report and Recommendations of an Impasse Panel (I-124-75) which provided, in part, that police officers work 10 additional chart days per year.
the general concept of "the interest and welfare of the public." History shows that impasse panels have interpreted "the interest and welfare of the public" to include consideration of the employer's ability to pay. 47/ This view is borne out by the May 1976 Report of the Committee on Labor and Social Security of the Association of the Bar of the City of New York, 48/ which said of the criteria now set forth in the NYCCBL:

It is expected that the criteria which must be considered in reaching a solution under the statutory impasse procedures will be sufficient to assure that impasse panels take into consideration the exigencies of the fiscal crisis.

Recently, Chairman Anderson testified before the Committee on Civil Service and Labor of the City Council, which was considering a bill to amend §1173-7.0(c)(3)(b) of the NYCCBL by adding ability to pay language to the statute. Chairman Anderson stated:

The 'financial ability of the public employer to pay,' although not stated verbatim in the present text of the statute, has been consistently recognized by OCB as a major factor to be considered by an impasse panel in recommending a wage settlement between the public employer and a public employee representative. Obviously, the public employer's ability to pay is of great importance and very relevant to wage determinations. 49/

47/ See Appendix F.

48/ The Record of the Association of the Bar of the City of New York, 31:386.

The bill was not voted out of committee because the members of the Committee felt that the proposed language was unnecessary. 50/

It must also be noted that all impasse panels are and have been bound by the financial emergency legislation in effect since September 1975. In Local No. 3, IBEW and City of New York, Decision No. B-8-76, the BCB held that:

[A]ll impasse panels are and have been bound by the emergency fiscal legislation since the inception of these laws in September, 1975. The passage by the State Legislature of the FEA and the ensuing creation of the EFCB were actions specifically addressed to the interest and welfare of the public and, as such, applicable to the actions of impasse panels pursuant to the mandate of criterion No. 4 of Section 1173-7.0(c)(3)(b) - 'the interest and welfare of the public.' It follows that in any statutory review proceeding before this Board, in accordance with Section 1173-7.0(c)(4) of the NYCCBL, the same is true. 50a/

Moreover, impasse panel awards, as well as negotiated settlements, are subject to approval by the Emergency Financial Control Board.

Thus, it is clear that the employer's ability to pay is taken into account in City labor contract negotiations and by third party factfinders in impasse proceedings. Because ability to pay has invariably been considered in the processes historically employed to reach collective bargaining agreements between the City and municipal employees, there is no valid basis for changing those processes; certainly not on the basis of the arguments set forth by the MMAB.

50a/ In a decision signed on April 20, 1977, the Board reaffirmed this holding and modified an impasse panel to conform to the EFCB guidelines. Dec. No. B-3-77.
We also take exception to the manner in which the MMAB would introduce its ability to pay criterion into the collective bargaining processes. 51/

The MMAB proposes that:

The implementation of this principal imposes stringent requirements for clear, precise, and strict definitions. First, it is important to distinguish the concept as a whole from productivity bargaining. Many different kinds of productivity such as producing better or more services at the same cost will not yield dollar savings and could not be counted as a basis for salary increases. Second, it is important to distinguish between cost savings attributable to labor and cost savings attributable to management or new technology. In most cases, management and labor will have to work together to cut costs, and benefits resulting from their combined efforts will have to be allocated between the unions and the City. Third, legitimate cost savings must be distinguished from savings derived from inappropriate reductions in the quantity or quality of service. This means that the standards of service or performance to be maintained over the time period of each contract must be clearly defined for each program or service. Fourth, the application of cost savings to wage increases can only be relevant in the context of a realistic financial plan. In effect, this means that until such time as the City's budget is balanced, most cost savings will have to be applied to bringing reasonable levels of expenditure in line with reasonable estimates of revenue. 52/

Under the collective bargaining system proposed by the MMAB, bargaining over employee demands for wage increases, which inherently includes discussion of the City's ability to pay such increases, would be segregated from bargaining over

51/ Obviously, we do not accept the implied assumption that ability to pay is not a criterion in the present collective bargaining processes.

52/ Personnel, p. 57-58.
employer demands for greater productivity. Historically, productivity bargaining and bargaining for wage increases have been intimately tied together in collective bargaining negotiations. The EFCB, the City Administration, and the municipal labor unions have all recognized that the two concepts are related. For example, in the recent negotiations with Transit Authority employees and with employees of the Board of Education, the City's ability to pay cost of living increases was conditioned upon and tied to productivity gains to be achieved by those agencies. The EFCB has promulgated the following as the wage and salary guidelines which it will use in reviewing labor contracts negotiated between the City and municipal labor unions:

a.) No agreement shall provide for general wage or salary increases or increases in fringe benefits.

b.) No agreement shall provide for increases or adjustments to salaries or wages, including those based upon increases in the cost of living, unless such increases or adjustments are funded by independently measured savings realized, without reduction in services, through gains in productivity, reductions of fringe benefits or through other savings (or other revenues) approved by the Board, all of which savings shall be in addition to those provided for in the financial plan.

c.) Each agreement shall provide for a mechanism to permit savings in pension costs or other fringe benefits during the term of agreement. 53/

Seeking to conform to the wage and salary policies of the RFCB, the City and almost all municipal labor unions recently entered into an agreement whereby the unions agreed to defer payment of wage increases for a two-year period and the city agreed to pay cost-of-living-adjustments (COLA), with the proviso that such payments to employees are conditioned upon the achievement of productivity savings in the agencies where the employees work, without a reduction in the level of services performed by each agency.

As previously noted, Administrative Order No. 28, issued by Deputy Mayor Zuccotti, provides that a program for developing greater productivity in each municipal agency, without reducing the level of service performed by the agency, is to be developed by Labor-Management Productivity Committees formed in each agency. While the MMAB does recognize that labor-management cooperation is needed to achieve greater productivity in municipal government, it stresses that only certain benefits derived from such cooperative actions are to be allocated between the unions and the City. Under the MMAB concept of "no negotiations" on permissive subjects of bargaining, we fail to see how such cooperation would continue to be possible. Of greater relevance to this discussion is the complete absence of mention of the need to provide incentives to individual employees if realistic productivity savings are to be achieved.

54/ Personnel, p. 67-68.
The MMAB would have the City and the unions, not individual employees, share in certain of the benefits of productivity savings. A more realistic approach is taken in Administrative Order No. 28, which established as a criterion for the payment of COLA to employees the achievement by the agency in which they are employed of productivity savings without a reduction in the level of services provided by the agency. This approach is more realistic because it recognizes that the employer's ability to pay wage increases is related to, and not independent of, achievement of cost savings through labor-management cooperation.

Indeed, the program set forth in the Administrative Order has a greater chance of producing a more efficient municipal government because it, in effect, provides for a system of incentives for lower echelon employees. While the MMAB continually stresses the need for a system of rewards and incentives for managerial employees, it ignores the concomitant need for such a system for lower echelon employees.

Moreover, the program set forth in the Administrative Order allows for greater managerial discretion in the methods of achieving greater productivity and in the application of the benefits of cost savings. In one part of the Report, the MMAB prohibits managers from cooperating with labor in establishing a productivity program; in this part of its Report, the MMAB specifies a complex structure of areas to which cost savings are to be allocated. In our judgment, the more flexible approach taken in the Administrative Order
is the appropriate course for the City to follow in charting its future.

We also note that the MMAB's fourth guideline for implementation of the ability to pay criterion would impose a heretofore unknown pre-condition in municipal collective bargaining negotiations, i.e., that any provision for wage or cost-of-living increases, even if conditioned upon productivity increases, could be withheld by the City until the City's budget is balanced. The City's budget consists of many items. Yet, the MMAB would condition only wage or cost of living increases on the balancing of the multi-faceted budget. We think that bilateral consultation should be undertaken before this MMAB recommendation is adopted as a management policy of the City.

B) Development of Collective Bargaining Arena That Covers All Public Agencies Serving New York City

The MMAB argues that another reason why the present collective bargaining framework does not relate personnel costs to the City's fiscal capabilities is because there is presently no mechanism for coordinating the policies of the City's mayoral and independent agencies with regard to labor relations. 55/

As a solution to this problem, the MMAB calls for the establishment of "An independent entity responsible on an

55/ Personnel, p.35.
on-going basis for overseeing the collective bargaining of all public agencies serving New York City ...." 56/ The responsibilities of this entity would be:

   a) [T]o insure that negotiations carried out by New York City's Office of Labor Relations are coordinated with the negotiations carried out in 'independent' units such as the Transit Authority, or quasi-independent units such as the Housing Authority, OTB, and the Boards of Education and Higher Education; b) to prepare the detailed guidelines on cost savings, standards of service, etc. needed to establish the context within which the bargaining would take place; and c) to verify that the proposed settlements do in fact meet the established guidelines. 57/

According to the MMAB, the EFCB is such an entity. Therefore, the MMAB recommends that the term of the EFCB be extended beyond the expiration date of the Emergency Financial Control Act.

The proposal to have jurisdiction over the labor relations of all the agencies which serve New York City placed in one board is not new. In 1969, the Governor's Committee on Public Employee Relations (commonly referred to as the Taylor Committee) recommended that the jurisdiction of OCB be expanded to cover all public employers and employee organizations fiscally dependent, entirely or largely, upon the City of New York. Later that year, the Mayor urged the State Legislature to pass

56/ Personnel, p.58.
57/ Ibid.
legislation which would broaden OCB's jurisdiction to include authority over all public or quasi-public agencies which provide municipal services to New York City.  

This proposal was submitted with several others as part of a report designed to bring the labor relations procedures adopted by the City of New York into substantial equivalence with the Taylor Law. The members of PERB, commenting on the Mayor's recommendation to expand OCB jurisdiction, were in general agreement with the proposal.  

OCB supported the proposals in 1969, and continues to support them now. But, despite the support of the Taylor Committee, the Mayor, PERB and OCB, the Legislature then refused to pass the legislation and has remained reluctant to do so.

We assume that the MMAB recognizes that its recommendation for an all encompassing entity would require amendment of the Taylor Law and of the NYCCBL. However, nowhere does the MMAB suggest legislation which would accomplish the goal of coordinating labor relations over all independent agencies through 


59/ Comments of PERB Regarding the Employees Relations Report of the Mayor of the City of New York, dated December 1, 1969.
one administrative entity. Nor does the MMAB indicate any awareness of the above-noted past efforts to accomplish this objective. The MMAB appears to assume, mistakenly, that the City could exercise authority over the non-mayoral agencies on its own initiative.

The MMAB also ignores reality when it suggests that coordinated authority over the labor relations of all municipal agencies could be achieved simply by extending the term of the EFCB. The MMAB seems to be unaware of the legal issues involved in the creation of the EFCB by the Financial Emergency Act. It must be recognized that the EFCB was created at a time of fiscal emergency declared by the Legislature and, because of the emergency, the agency was vested with unusually broad authority and given a strong voice in City affairs. To establish the EFCB as a permanent fixture in the City's affairs would require comprehensive State legislation and amendment of the New York State Constitution "Home Rule" provisions.

We would suggest that the MMAB, in recommending a permanent EFCB, "clarify" clearly who the employer is and consider the consequences of such action. If the envisioned super agency is to have final veto over any agreement the City negotiates with public employee representatives, then that super agency may replace the "City" as the "employer" with whom
municipal unions are to bargain, as both the NYCCBL and the Taylor Law require that the "appropriate" public employer negotiate collectively with the public employee representative in good faith.

C) Reform of the Prevailing Wage Rate System

The third major action needed to develop a cost-sensitive framework for collective bargaining, suggested by the MMAB but attributed to unidentified proponents, is that the City exercise "its option to place skilled municipal craftsmen in a graded service, a step which would work to remove these employees from Section 220 of the State Labor Law." 60/ The MMAB further recommends that the City first take action to bring $220 employees under the jurisdiction of the EFCB.

While the City may have an "option" to place municipal craftsmen in the graded civil service, we would recommend that the City give all interested parties, including the unions representing the craftsmen, an opportunity to comment before taking such action. In addition, it is our belief that State legislation would be needed to bring $220 employees under the jurisdiction of the EFCB.

60/ Personnel, p.59.
4. **Develop a Streamlined Personnel System**

To simplify the City's personnel system, described as extremely complex, the MMAB recommends that three major actions be taken:

1) Integration of Civil Service and labor relations into a single system;
2) simplification of the City's personnel classification system; and
3) modernization of collective bargaining machinery. 61/

A) Integration of Civil Service and Labor Relations

The MMAB characterizes the City's current personnel system as complex and inefficient, citing areas of overlap between the Civil Service system and labor relations system as the major source for such conditions. 62/ Specifically, the MMAB finds two areas of "total redundancy" resulting from two personnel systems: the Civil Service Career and Salary Plan and salary scales as determined by collective bargaining; parallel procedures for determination of grievances, especially disciplinary actions. The MMAB recommends that a single integrated personnel system be established and that a single organizational entity, combining the functions of the Office of Labor Relations with those of the Department of Personnel, be created to administer the system.

61/ Personnel, p.49.
62/ Personnel, p.21.
We generally have no objection to this MMAB recommendation, but would point out facts and issues of law not touched upon in the Report.

Under the terms of Personnel Order 21/67, employees who are represented by a certified employee organization have their wage increments determined by collective bargaining agreements and not by the Civil Service Career and Salary Plan. This differs from the State system, wherein employee pay increments are determined under both the Civil Service system and the collective bargaining system. In New York City, employees are under one pay plan or the other.

In addition, while the grievance machinery of the Civil Service system may parallel that of a collective bargaining agreement, the two grievance resolution systems do not overlap. An employee may seek a remedy under a collective bargaining system or through administrative forums, but may not seek resolution of a grievance in two forums. Indeed, the NYCCBL specifically provides that as a condition of invoking contractual grievance arbitration for the resolution of a grievance, the grieving employee must waive any rights to seek redress of his claims in any other forum. 63/ Thus, under the NYCCBL, the employee must choose between civil service and contractual remedies; he cannot have both. It should be noted that such an alternative method was approved by Court of Appeals in Board of Education v. Assoc. Teachers of Huntington, 30 N.Y. 2d 122 (1972).

63/ NYCCBL §1173-8.0(d)
We have no quarrel with the suggestion of the MMAB that job security and working conditions of employees should be protected through procedures operating in the collective bargaining area. In 1972, the State amended §76 of the Civil Service Law to permit civil service protections to be "supplemented, modified or replaced by agreements between the state and an employee organization." Under this provision, State employees could be bound by collective bargaining agreements to their contractual remedies for the resolution of grievances, permitting such contract clauses to replace civil service remedies. The statute was recently found constitutional by the Court of Appeals in Antinore v. State of New York. 64/

We also note that the integrated procedure proposed by the MMAB for processing disciplinary matters apparently would not provide for union representation of the grievant after the initial determination of the grievance. Also disturbing is the proposal to have disciplinary grievances appealed to State Supreme Court, rather than to grievance arbitration. Without an extended discussion of the virtues of grievance arbitration, we would only point out that court actions are generally more costly and more time consuming than is arbitration. 65/


65/ The disadvantages of litigation of such disputes in the courts are characterized as "cumbersome" in the Memorandum in support of legislation proposed by the Governor. The proposed legislation would permit the negotiation of informal appeal procedures by political subdivisions of the State and by school districts.
Furthermore, the Court of Appeals has formally endorsed grievance arbitration as a means of public employee disputes settlement. 66/ As stated by the Court in a 1976 case:

Indeed, we have asserted that public policy prefers arbitration as a device for the resolution of labor controversies and frowns upon judicial attempts to resolve such disputes. [citations omitted] 67/

Moreover, the Court of Appeals, in Huntington, held that a grievance arbitration clause, providing for arbitration of disputes concerning disciplinary actions taken against tenured teachers, is a mandatory subject of bargaining under the Taylor Law, stating that:

It is of more than passing significance that the Taylor Law explicitly vests employee organizations with the right to represent public employees not only in connection with negotiations as to the terms and conditions of employment but also as to 'the administration of grievances arising thereunder' (Civil Service Law, §203; [italics in original]). Indeed, it is the declared policy of this State to encourage 'public employers and ... employee organizations to agree upon procedures for resolving disputes' (§200, subd. [c]). And arbitration is, of course, part and parcel of the administration of grievances. [citations omitted] 68/

66/ Huntington, supra, page 70.


68/ 30 N.Y. 2d at 130, 331 N.Y.S. 2d at 24.
Thus, it is our opinion that the MMAB proposal concerning 
resolution of disciplinary grievances is contrary to the estab-
lished public policy of the State and to decisions of the Court 
of Appeals which hold grievance arbitration to be a mandatory 
subject of bargaining. We also believe that the MMAB proposal 
"allowing the unions to participate in conflict resolution, 
initially," 69/ is not substantially equivalent to procedures 
established by and under the Taylor Law as is required by that 
statute. 70/

B) Simplification of the City's Personnel 
Classification System

The MMAB states that, "Within the Civil Service arena, 
the most serious example of complexity can be found in the area 
of job classification." 71/

To alleviate the problem, the MMAB recommends a top to 
bottom consolidation of occupational groups and titles. The 
MMAB suggests that, "At the broadest level, the City should 
establish a small number of major classes or services, each 

69/ Personnel, p.49. 
70/ Civil Service Law, §§203 and 212. 
71/ Personnel, p. 24.
composed of related occupational groups." By imposing this 
superstructure on the City's Personnel Classification system,
the MMAB believes that a framework will exist for "a compre-
hensive long-term process of combining titles, thus facilitating 
personnel planning and control." 72/

This subject is clearly within the domain of the Civil 
Service system. However, to the extent that such determinations 
affect OCB, the Board of Certification has had, since 1968, a 
policy of consolidating and combining titles into City-wide 
units of occupationally related titles, based upon mutuality of 
interests, the history of collective bargaining and other factors, 
and has sought to so combine titles whenever it is possible to 
do so without severe dislocations and inequities. 73/

The MMAB believes that imposing a "superstructure" on 
the job classification system will provide a framework for con-
solidating and combining, within that framework, occupational 
groups and titles. This is consistent with the goals and 
policies of OCB, i.e., to consolidate existing bargaining units 
into broad occupational titles for the purposes of collective 
bargaining. The process used by the Board of Certification 
allows for labor-management consultation in the effort to 
simplify the City's job classification system.

72/ Personnel, p.52.
73/ See Board of Certification Decisions Nos. 44-68; 38-69; 
40-69; 45-69; 64-69; 4-70; 12-70; 59-70; 31-73; 18-74; 31-74; 
38-74; 50-74; 68-74; 22-75.
We also note that in its proposals concerning the City's personnel system, the MMAB stresses that the first priority is to establish a managerial service class, and to develop a strong identity for managers. The MMAB cites as a problem "the fact that the City has blurred the traditional distinction between managers and workers by adding a large middle, grey area of 'supervisor,'" which the MMAB believes "has resulted in a situation whereby many employees who are actually managers are still included under union contracts" and are included "in the same bargaining units as the workers whom they supervise." 74/

Prior to the 1971 Taylor Law amendments and the 1972 NYCCL amendments explicitly excluding managerial employees from bargaining, the Board of Certification determined that inclusion of managerials in collective bargaining would create conflicts of interest, interfere with the right of the employer to formulate, determine and effectuate its labor policies with the assistance of employees not represented by the union with which it deals, cause disruption of managerial procedures, interfere with the efficient operation of the City in personnel matters, and be an impediment to collective bargaining. 75/

We would also point out to the MMAB that the Legislature has been reluctant to expand the definition of the managerial personnel, pp. 28-29.

See Board of Certification Decisions Nos. 79-68; 43-69; 52-69.
class, thereby excluding certain employees from collective bargaining. For example, the Legislature amended the Taylor Law to include Deputy-Chiefs of Fire Departments in the non-managerial class. Similar action has been taken by the Legislature regarding the managerial levels of school principals and school administrators.

Against this backdrop, we note that during 1975 and 1976 the Board of Certification excluded additional large numbers of employees on the grounds that they are managerial and/or confidential. The Board of Certification has similar major cases pending. In summary, it has been the policy of existing law and of the Board of Certification to consolidate bargaining units and to exclude managerial employees from collective bargaining.

C. Modernization of the Collective Bargaining Machinery

The MMAB states that another problem with the City's personnel system is that:

Many of the City's important labor relations functions are currently characterized by complexity and fragmentation. First, the City is burdened by the need to negotiate with 122 separate collective bargaining units. Second, it lacks a mechanism for balancing the different perspectives on bargaining which exist in government. In addition, the role of the Board of Collective Bargaining needs clarification. 76/
To resolve the problem of the large number of bargaining units in the City's labor force, the MMAB recommends that, "An explicit timetable for the reduction of bargaining units with specific targets to be reached by specific times should be set." 77/

The MMAB recognizes that OCB and the Office of Labor Relations deserve credit for their efforts in reducing the number of bargaining units from 800 to 122; at this writing the number of bargaining units is 92.

It should also be recognized that major matters of bargaining are negotiated City-wide and incorporated into City-wide contracts, which cover large numbers of bargaining units. Indeed, the objectives sought by the MMAB, requiring the City to bargain with a small number of units, have, in part, been realized during the present fiscal crisis as evidenced by the wage deferral and productivity agreements negotiated by the City with bargaining committee representatives of the MLC. These agreements were later ratified by locals representing smaller units.

In reducing the number of bargaining units to 92, the Board of Certification has had the statutory responsibility of monitoring and reexamining on a continuing basis all existing bargaining units with a view to promoting efficient operation of the public service and sound labor relations. In practice,

77/ Ibid.
this has been found to require continuing efforts to reduce the number of bargaining units in a manner compatible with statutory criteria: full freedom of public employees to exercise their rights under the NYCCBL; community of interest among employees; the history of collective bargaining; the effect of the unit(s) on the efficient operation of the public service and sound labor relations; and the effective authority of the relevant government officials to bargain.  

Amendment of the Taylor Law would be required in order to achieve a radical reduction in the number of bargaining units. Section 202 of the Taylor Law grants to public employees the right to "form, join, participate in ... any employee organization of their own choosing." Infringement upon that right, by reducing the number of bargaining units, requires an opportunity for public employees to be heard and the adherence to reasonable statutory criteria, in accordance with the constitutional doctrine of due process of law.

A further obstacle to an accelerated reduction in the number of bargaining is the implementation of §1178 of the new City Charter, effective January 1, 1977. That section provides that supervisory employees shall not belong to the same bargaining unit as their subordinates for purposes of collective bargaining. It has been estimated that implementation of §1178 would at least double and, more likely, triple or quadruple the

78/ For example, see Board of Certification Decision No. 68-74.
number of existing bargaining units. 79/

To summarize, the objectives sought by the MMAB have, in part, been achieved by the OCB and its implementation of existing statutes. It is our belief that further accelerated reduction in the number of bargaining units would require amendment of the Taylor Law and of the new City Charter, including a clear definition of "managerial."

As a further means of "modernizing" the collective bargaining machinery in the City, the MMAB proposes that the City establish a formal, year-long process of preparation for collective bargaining firmly linked to the budgeting process in those years in which negotiations take place. The present lack of coordination between budget processes and collective bargaining has, according to the MMAB, lead to the following:

Where collective bargaining settlements precede the adoption of the budget, City negotiators operate without any sense of the limits of the City's resources. Where collective bargaining settlements follow budget adoption, the budgets themselves cannot take explicit recognition of the cost consequences of negotiated settlements. This lack of coordination has virtually guaranteed the necessity to borrow to meet unanticipated labor costs. 80/

The problem is real and OCB has recognized the problem. However, we would point out that the least observed provision

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79/ See attached letter, dated October 15, 1976, from John T. Burnell, Director of the Office of Labor Relations, Arvid Anderson, Chairman of OCB, and Victor Gotbaum, Chairman of the MLC, to Hon. Paul O'Dwyer, President of the City Council.

80/ Personnel, p.38.
of the Taylor Law is the coordination of budget deadlines to the bargaining process. We would suggest that collective bargaining, although guided by budget deadlines, cannot be performed strictly by the clock. Any system devised to coordinate budget deadlines and collective bargaining must take into consideration the various sources of monies, e.g., State, Federal and local governments, which fund municipal agencies. Neither the City nor the State receive funds from outside sources all at one time.

A further improvement in the present collective bargaining machinery suggested by the MMAB is that a "fact-finding operation" be established for developing an accurate and credible data base to provide labor and management with basic factual information on questions related to the negotiation of settlements. The MMAB feels that it is essential that both the unions and the City agree in advance to accept the facts developed by a computerized data bank.

It is our belief that while a jointly developed data base could be helpful in bargaining, joint consideration must be given to many factors before the City and the unions could be expected to accept the data produced by a computer. Recently, former Secretary of Labor John Dunlop stressed the need for development of a public sector data base in which all parties in public sector bargaining will have confidence and which all parties will use. Mr. Dunlop warned against turning such a project over to the statisticians, stressing that the practitioners and users must have input. 81/

81/ GERR, 700:9.
OCB has subscribed to the notion of developing a common data base. In a letter, dated June 17, 1976, from OCB Chairman Anderson to William J. Usery, Jr., Secretary of Labor, it was stated:

I fully realize that accurate statistics about the total cost of employee services will not solve the City's fiscal crisis or eliminate bargaining disputes, but such facts could end the argument over what the real figures are and thus allow the bargainers and elected officials to concentrate on the wisdom of proposed changes in compensation and allow political judgments as to employee salaries and benefits to be based on solid facts.

We believe that the Bureau of Labor Statistics of the U.S. Department of Labor is best equipped to provide a credible data base for use in public sector collective bargaining. Twice, OCB has expressed this belief to the Secretary of Labor. It is our opinion that the improvements in public sector collective bargaining sought by the MMAB in recommending a common data base would be more easily attained if the Bureau of Labor Statistics were mandated to compile such a data base. 82/

82/ We also note that the American Arbitration Association, under the leadership of Donald B. Straus, has been an early and persistent advocate of the use of computerize bargaining data to assist negotiators.
CONCLUSION

In conclusion, our objections to the Mayor's Management Advisory Board's Personnel Report concern the proposed major revisions of the NYCCBL, the structure of the BCB and the manner of conducting City labor relations. Although we do not believe the present law and structure of municipal labor relations to be perfect, it is our opinion that recommendations for major revision ought not be based on the patent misconceptions of law and fact so prevalent in the Report. While the MMAB recognizes in a general way that legislation may be necessary to implement its proposals, the Report does not specify the amendments to the Taylor Law, the Civil Service Law and the NYCCBL which would be necessary. Furthermore, we believe that any amendments of statutes and reform of the City's labor relations structure should seek to strengthen, not destroy, the system of labor-management consultation and the spirit of cooperation between the City and municipal labor unions fostered by and existing since the enactment of the NYCCBL. Such improvements ought to be the product of joint deliberations by the City, the municipal labor unions and the OCB -- as well as other interested parties, including the MMAB, if it is willing to participate.
APPENDIX A

This appendix contains correspondence sent by Arvid Anderson, Chairman of OCB, to Lawrence Lachman, Co-Chairman of the Personnel Task Force of the Mayor's Management Advisory Board. The following documents were forwarded by Mr. Anderson to Mr. Lachman on October 20, 1976:

Statement of Arvid Anderson to the Manpower Committee of the City Club, dated December 8, 1972

Memorandum of the OCB to the State Charter Revision Commission, dated June 6, 1975

Memorandum of the Impartial Members of the BCB commenting on proposed amendments to the NYCCBL recommended by the Office of Labor Relations, dated May 12, 1976

Statement of Arvid Anderson to the City Council Committee on Civil Service and Labor, dated September 15, 1976

Memorandum of Interim Understanding between the City of New York and Municipal Labor Unions, dated June 30, 1976

Letter from Arvid Anderson to William J. Usery, then Secretary of Labor, dated June 17, 1976

Statement of Policy by the Municipal Labor Committee re: mandatory subjects of bargaining; the management rights clause of the NYCCBL; and arbitrability, dated as received by OCB on December 12, 1974.

These documents are available on request at the Office of Collective Bargaining.
Mr. Lawrence Lachman, Co-Chairman
Personnel Task Force,
Mayor's Management Advisory Board
City of New York
New York, N.Y.

Dear Mr. Lachman:

Pursuant to your invitation, I have considered the proposals contained in the Final Draft of the Personnel Task Force Report dated September 9, 1976 which you gave to me on September 17th, for the purpose of receiving the suggestions and comments only of the Impartial Members and the staff of the Office of Collective Bargaining. After reviewing the Final Draft and discussing the matter with my Impartial Members and also with Labor Member, Harry Van Arsdale, Jr. of the Board of Collective Bargaining, who is also a member of the Mayor's Management Advisory Board, I am submitting the following reply.

As I discussed with you and Mr. Vincent Brennan last Friday, it is the view of the Impartial Members that any response from the OCB dealing with possible changes in the structure of the agency should come from the full tripartite Board of Collective Bargaining because the tripartite approach is the fundamental principle upon which the New York City Collective Bargaining Law and its administration has been based. Therefore, any judgment as to fundamental structural changes in that tripartite procedure, either as to the composition of the Board or in the manner of selection of Board members, should be considered by the full tripartite Board of Collective Bargaining with input from the City Administration and the Municipal Labor Committee.

The proposed letter of transmittal from the Mayor's Management Advisory Board to the Mayor acknowledges that some of the recommendations proposed in the Final Draft "would require discussions with union leadership and the preparation of new legislation." We feel that the appropriate time for such discussion
is now, before the report is issued. It is my understanding that Mr. Van Arsdale fully shares the view that the City and Labor Members of the Board of Collective Bargaining should have the opportunity at this time to consider the proposals in the Personnel Task Force Report which recommend changes in the collective bargaining law and in the composition and manner of selection of the members of the tripartite Board of Collective Bargaining.

Therefore, the Impartial Members feel that they must reserve further comment concerning the proposed structural change until the full Board of Collective Bargaining is afforded the opportunity to examine and discuss the suggested proposals.

While I am certain that the entire Board also would like the opportunity to consider other recommendations in the draft proposal, the Impartial Members at this time want to reiterate what I stated last Friday, namely, that the Final Draft does contain certain erroneous assumptions and errors of fact which, in our view, significantly affect the proposed recommendations. By way of example, there is an error of fact with respect to whether the criterion of "ability to pay" has been considered by neutrals. There are other incorrect assumptions as to how the "practical impact" clause of the management rights provision of the NYCCBL has been interpreted by the Board of Collective Bargaining and by the courts.

I also remind you of my comment on the inaccuracy which assumes that the City's coverage under Section 220 of the State Labor Law, with respect to skilled tradesmen, is optional. It is our understanding of the existing Section 220 of the State Labor Law that there is no such option.

There are also certain inaccuracies in the Final Draft with respect to the determination of managerial status, both under the NYCCBL and the Taylor Law, but I am pleased to note, as I did when we met, that the report recognizes the potentially serious problem inherent in any attempt to press for implementation of the Charter Commission provisions dealing with supervisory, professional and managerial employees, an attempt which could undo nine years of effort to consolidate existing bargaining units in New York City. There are other matters raised in the Final Draft which the entire Board of Collective Bargaining should address in detail.
Before the Impartial Members and the entire Board of Collective Bargaining are asked to review the Final Draft, I would like to know whether, in your view, there is any likelihood of modification of any of the recommendations proposed in the report if it is demonstrated to the Mayor's Management Advisory Board that some of the principal recommendations are based on inaccurate facts or faulty assumptions.

Please be assured that the Impartial Members and the staff of the OCB are continuing to work on a comprehensive response to the draft proposals and will be prepared to submit them to you when and if they have been considered by the City and Labor Members of the Board of Collective Bargaining.

Sincerely,

Arvid Anderson
Chairman

AA: clc
cc: Walter L. Eisenberg
Eric J. Schmertz
Harry Van Arsdale, Jr.
October 20, 1976

Mr. Lawrence Lachman, Co-Chairman
Personnel Task Force
Mayor's Management Advisory Board
City of New York
New York, N.Y.

Dear Mr. Lachman:

We are in the process of completing our comprehensive analysis and response to the Final Draft of the Personnel Task Force Report. As I noted in my letter of September 23rd, the Draft Report acknowledges in the letter of transmittal to the Mayor that some of the recommendations "should require discussion with union leadership and the preparation of new legislation."

In addition, we have noted that the forward to the Report states:

"To achieve good labor relations, both strong unions and strong management are needed, each articulating their interests and negotiating their differences. As in the private sector, we would expect that those Report proposals which affect organized labor will result in a process of discussion and negotiation between unions and management, from which a common course of action to improve City government will emerge."

Thus, consistent with that statement, I suggest, as I did in my prior letter, that it would be most helpful if we could have the opportunity to submit the Final Draft proposal to our tripartite Board for its comments.
In the meantime, the Task Force might want to examine some of the public documents upon which our response will be based. I am enclosing prior public statements by the Impartial Members of the Board of Collective Bargaining and by me alone, as well as other public documents which relate to some of the questions raised in the Report regarding the structure of the agency, ability to pay, practical impact decisions, the bargaining unit structure and reliable bargaining data.

I hope you will find the enclosed documents of interest and I look forward to the opportunity of submitting our statement on the Draft proposals, including comments by the Impartial, as well as the City and Labor Members of our Board.

Sincerely,

Arvid Anderson
Chairman

AAielc
encl.

cc: Walter L. Eisenberg
    Eric J. Schmertz
    Harry Van Arsdale, Jr.
APPENDIX B

Biographical narratives of each of the Members of the Board of Collective Bargaining.
ARVID ANDERSON, IMPARTIAL CHAIRMAN

Arvid Anderson, Chairman, has had over twenty-nine years experience in private and public sector labor relations and labor law. He is a graduate of the University of Wisconsin and is a holder of a B.A. and LL.B. degrees. Mr. Anderson has been Director of the Office of Collective Bargaining and Chairman of the OCB's Board of Collective Bargaining and the Board of Certification since the OCB's inception in late 1967. He is a former Commissioner of the Wisconsin Employment Relations Commission and past president of the Association of Labor Mediation Agencies. He is a member of the National Academy of Arbitrators and Chairman of its Public Sector Disputes Settlement Committee for the past four years. He is a member of the American Arbitration Association and of the Labor Law Section of the American Bar Association. He is a member of the Foreign Service Grievance Board of the U.S. Department of State. He has, on request, appeared as an expert witness before two Congressional Labor Committees, before committees of the New York State Legislature and before legislative and study committees of ten other states. He is an Adjunct Professor at the New York University Graduate Law Center and a Visiting Professor at Cornell University's School of Industrial & Labor Relations. In 1977, he was the recipient of the Edward Corsi Award of the Labor-Management Relations Institute of Pace University for outstanding contributions in Public Sector labor relations.
WALTER L. EISENBERG, IMPARTIAL MEMBER

Walter L. Eisenberg is a distinguished economist who has more than 30 years experience as arbitrator, mediator, fact-finder and consultant in private sector and public sector labor relations. He is Professor of Economics at Hunter College (CUNY) and has served as Dean of Graduate Studies and Chairman of the Department of Economics for that College. He has also served as Visiting Professor of Economics at Cornell University School of Industrial and Labor Relations and on the faculties of Columbia and Rutgers Universities. He served on the War Labor Board as Executive Director of the New York Regional Transportation Industry during World War II, and as Associate Director of the New York Regional Wage Stabilization Board during the Korean War. He has been Chairman and/or Public Member of various panels or commissions at the federal, state, or local levels on problems relating to minimum wages, pensions, employment and regional development activities. His arbitral experience extends to many of the major industries of the nation's economy in the private sector, and in the public sector includes equally wide experience in federal, state and local government including arbitration, mediation and fact-finding. He is Impartial Chairman under various public sector and private sector collective bargaining agreements. He holds Doctoral degrees in Economics from Columbia University and is the author of numerous reports and studies on topics in collective bargaining and economics. Professor Eisenberg is a member of the National Academy of Arbitrators; a member of the labor arbitration panels of the AAA, PERB, FMCS, New York State Mediation Board, New Jersey State Board of Mediation, among others; and, since 1969, is an Impartial Member of the Board of Collective Bargaining and Board of Certification.
ERIC J. SCHMERTZ, IMPARTIAL MEMBER

Eric J. Schmertz, Professor of Law at Hofstra University School of Law, is one of the City's ablest and most experienced labor mediators and arbitrators. He serves as a professional arbitrator in several important industries, with special emphasis upon local government employment relations. He is a contract arbitrator under the General Electric Company, IUE, AFL-CIO National Agreement. From 1962 to 1968, he was a member of the New York State Board of Mediation, having served previously as its Executive Director. He is the Referee of disciplinary cases for the NYC Transit Authority and a rotating panel arbitrator for the NYC Off-Track Betting Corporation. He serves in a variety of arbitral capacities in a number of private industries and as the arbitrator, mediator or fact-finder in a wide range of federal, state, and local cases. He was the first recipient and occupant of the American Arbitration Association's J. Noble Braden Arbitration Chair and serves as a co-Chairman of the Association's Mediation Committee and is a member of its Law Committee. His writings on the subject of collective bargaining and labor law are well known to practitioners and students throughout the country. Professor Schmertz is a member of the National Academy of Arbitrators, American Arbitration Association, and of the panels of the Federal Mediation and Conciliation Service, N.Y. and N.J. Mediation Boards, the N.Y. PRR and the N.J. PERC. He has been an Impartial Member of the Board of Collective Bargaining and Board of Certification since 1968.
Virgil B. Day, a prominent attorney and labor relations expert, is a senior partner in the law firm of Vedder, Price, Kaufman, Kammholz and Day. He is a former Vice-President of the General Electric Company after first having served that Company in a variety of capacities in employee relations and public affairs. He has served as a member of the Board of the U.S. Chamber of Commerce and as employer advisor to several U.S. delegations to the International Labor Organizations. From October 1971 to March 1973, Mr. Day served as Chairman of the business members of the Phase II Pay Board of the Federal Government. He has been a City Member of the Board of Collective Bargaining since November 1976.
EDWARD SILVER, CITY MEMBER

Edward Silver, an attorney specializing in labor relations and labor law, is a senior partner in the law firm Proskauer Rose Goetz and Mendelsohn. He is management representative for leading companies in the maritime, brewing, commodities, insurance and banking industries. Mr. Silver is or has been a member of the Labor Committee of the Association of the Bar of the City of New York; the American Bar Association; New York County Lawyers Association and the New York State Bar Association. Mr. Silver is widely recognized as being one of the most competent and respected labor lawyers in the nation. He has been a City Member of the Board of Collective Bargaining since 1968.
Edward F. Gray, Labor Member

Edward F. Gray is Assistant Director of Region 9 of the United Automobile Workers, with major responsibility for directing and coordinating the collective bargaining, legislative, political, educational, and community action activities of 100,000 UAW members employed in automobile, aerospace, electronic, and metal working plants in the tri-state area of New York, New Jersey and Pennsylvania. A major UAW program developed by Mr. Gray is the UAW Region 9 Housing Corporation, a non-profit housing agency created to provide homes for lower and middle-income individuals and senior citizens in 19 cities within the Region 9 area. In 1977, Mr. Gray together with his wife Lois became the joint recipients of the prestigious Walther P. Reuther Memorial Award, bestowed periodically by the Americans for Democratic Action for outstanding humanitarian service. Mr. Gray has been a Labor Member of the Board of Collective Bargaining since 1974.
HARRY VAN ARSDALE, JR., LABOR MEMBER

Harry Van Arsdale, Jr. is President of the 1.2 million-member New York City Central Labor Council. He is also Treasurer of International Brotherhood of Electrical Workers and Financial Secretary for the IBEW, Local 3 in New York City. He is Co-Chairman, with banker David Rockefeller, of the Business-Labor Working Group which is studying ways to strengthen the City's economy. Until March of this year, Mr. Van Arsdale was president of the Taxi Drivers Union; a post he resigned because of the heavy demands placed on him by his other duties. He has been a Labor Member of the Board of Collective Bargaining since its inception in late 1967.
APPENDIX C

REPORT SUBMITTED PURSUANT TO CHAPTER 24, LAWS OF 1969, DESIGNED TO BRING NEW YORK CITY'S LABOR RELATIONS PRACTICES INTO SUBSTANTIAL EQUIVALENCE WITH THE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT.

JOHN V. LINDSAY
MAYOR
CITY OF NEW YORK
The drive by public employees to gain the recognition, protection, and comparable wages and working conditions enjoyed by employees of private business has spread to cities and states across the nation. This movement has presented a great challenge to public employers -- to recognize public employee rights and organizations, to bargain in good faith with employee representatives, to set forth procedures for settling disputes and grievances, and thus to achieve the stability in labor relations essential to protect the public. Many public employers, unfortunately, have not moved quickly enough to meet the challenge, and in consequence the public they serve has suffered interruptions of vital services, higher costs and countless inconveniences.

The City of New York, I am proud to say, has faced the challenge of promoting harmonious labor relations with its employees. Towards this end, I submitted a bill enacted by the City Council which established the New York City Office of Collective Bargaining (OCB) effective September 1, 1967, the same day the State's Public Employees' Fair Employment Act (Taylor Law) took effect.

During the eighteen months it has been in operation, the OCB has done much to bring order and equity into public labor relations in the City of New York. One hundred twenty-two requests for arbitration and mediation services have
been processed, and 29 bargaining impasses between various unions and the City were satisfactorily resolved without work stoppage. The Board of Certification has completed 179 representation proceedings; the Board of Collective Bargaining has rendered decisions on 29 cases arising from disputes over arbitrability, scope of bargaining or full faith compliance. Thus scores of disputes which would otherwise threaten vital services have been resolved fairly and amicably. Measured by its impact on stabilizing labor relations, the OCB has fully demonstrated its effectiveness and the need for its continued operation in New York City.

The OCB functions under the home rule option granted by the State Legislature permitting local public employers to set up their own procedures for resolving controversies of representation and bargaining impasses. Although other local governments were required to demonstrate the "substantial equivalence" of their procedures to the provisions of the Taylor Law, New York City was excepted.

During 1969, the Taylor Law was amended to incorporate certain recommendations made by the Taylor Committee. The new law required the Mayor of the City of New York to submit, on or before August 1, 1969, a report of the steps taken and a plan designed to bring the labor relations procedures adopted by the City of New York into substantial equivalence with the provisions of the Taylor Law. The law directs the Mayor to address his report particularly
to three matters: (1) making effective the jurisdiction of the OCB, (2) the need for a specified final step in the impasse procedures, and (3) the relation of negotiations and impasse procedures to budget submission dates.

This statement is submitted in compliance with that Law. Prior to submission it has been discussed with the Board members of the OCB and with the Municipal Labor Committee. All have indicated their concurrence with it.

1. Making Effective the Jurisdiction of the Office of Collective Bargaining

The division of the jurisdiction over public employment relations in New York City has created a serious problem which can be remedied only by the legislature.

The OCB has mandatory jurisdiction over "mayoral" agencies. Several other "non-mayoral" public agencies in the City meet the Taylor Law's definition of "government" or "public employer" and are authorized to conduct their labor relations independently of the City. This has created an anomaly under which the City's OCB procedures are mandatory over 50 mayoral agencies employing 160,000 public employees, but not over 29 non-mayoral agencies with a total of 140,000 employees. As recognized by the Taylor Committee, this unfortunate division of jurisdiction has created confusion, inconsistency, and weakening of the City's labor relations procedures.
The City's Collective Bargaining Law recognized the harmful effects of this division and made allowance for it by permitting non-mayoral agencies, with the Mayor's approval, to accept the jurisdiction of the OCB.

Several non-mayoral agencies within the City have elected to submit to OCB jurisdiction and procedures regarding representation and bargaining impasses. These include: the Board of Higher Education (non-pedagogical employees); the New York City Housing Authority; the District Attorneys' Offices of the five Counties; the Borough Presidents' Offices of the five Boroughs; the Comptroller's Office; and the non-judicial employees of the Judicial Conference of the 1st and 2nd Departments (for fiscal matters only). Approval of the Public Administrator's offices of the five counties is now being formalized. There are thus a total of some 200,000 employees now subject to the OCB procedures.

The following are not now under the jurisdiction of the OCB: the Board of Education; the Board of Higher Education (pedagogical employees); cultural institutions such as libraries, museums, zoos, botanical gardens, the Judicial Conference (non-fiscal matters); the Transit Authority; the Triborough Bridge & Tunnel Authority.

The services these non-mayoral agencies render are performed within the City and are closely linked to the municipal government. They are essential to the life of the City.
and are supported by City funds. Most employees of these agencies, for example, are under the jurisdiction of the City's Civil Services Commission. They enjoy transfer and seniority rights for positions in the City's Career and Salary Plan. They are eligible for membership in the City's Retirement System and serve in Civil Service titles common throughout the City. This interrelationship of civil service, retirement, transfer and other conditions of employment of non-mayoral employees manifestly requires the uniform regulation of the labor relations of non-mayoral employers through OCB procedures.

Because the City financially supports the operations of non-mayoral agencies, and because the Mayor ultimately is politically responsible for all municipal services, the OCB should have jurisdiction over the labor relations of non-mayoral employers in the City.

The City therefore agrees with the Taylor Committee's recommendation that the legislature should expand the statutory jurisdiction of the OCB. We urge legislation to broaden the OCB's authority to cover all public or quasi-public agencies which provide municipal services to the people of New York City. State legislation is necessary because several of the non-mayoral agencies involved are independent agencies headed by elected officials, and some are state bodies.

The transfer of jurisdiction to the OCB over the labor relations procedures of these public employers and their employees need not affect their independence and authority to provide public services.
2. The Need for a Specified Final Step in the Impasse Procedures

In order to increase the effectiveness of the OCB in resolving impasses, the City will seek local legislation which would make decisions of the OCB regarding impasses final and binding. Such legislation would, in substance, provide:

(a) In the event either one of the parties to an impasse dispute does not accept the report and recommendation of the impasse panel, the Director of the OCB shall submit the report and recommendations to the Board of Collective Bargaining for such further action as the Board may deem advisable and necessary.

(b) The Board of Collective Bargaining may, within thirty days after the dispute was submitted to the Board, alter or modify the recommendation of the impasse panel by a majority vote of the entire Board, including the affirmative vote of at least one labor and one City member. If the Board takes no action within thirty days, the recommendations of the impasse panel would be deemed to have been adopted by the Board. In either case the Board's decision shall be final and binding upon the parties and shall be released to the public.
3. "The Relation of the Negotiations and Impasse Procedures to Budget Submission Dates"

The Taylor Law, in excluding New York City from its budget submission procedure, recognized the enormous burden that such a provision would impose on the City. Our experience has proved the wisdom and practicality of the exclusion. Desirable as the goal may be, it has been impossible for New York City, and most other local governments, to conclude all collective bargaining agreements prior to budget submission dates.

The reasons for this difficulty are obvious. Collective bargaining cannot end at the budget deadline. It frequently requires many months to complete the negotiations, including mediation, fact-finding and arbitration, needed to reach agreement in labor disputes. Each step in the process -- selecting third parties, narrowing the issues, preparing reports and agreements, and voting -- is unique in each negotiation; there is no way to forecast with precision the time it will take to conclude the entire procedure.

The problems are more acute, and the budget submission provision especially unrealistic, for New York City, which each year must conclude hundreds of labor agreements individually with hundreds of bargaining units.

The City therefore strongly recommends that its exclusion from the Taylor Law's budget submission provision be continued. The City, however, intends to make every effort possible to conclude collective bargaining agreements prior
to the budget, deadline.

Other Areas Requiring Clarification or Modification

In addition to the three areas specified by the Legislature, the City's experience during the past eighteen months has suggested the need for several changes. For example, a bill designed to enhance the independence and impartiality of the OCB by providing the Board with separate counsel has been introduced in the City Council. A discussion of other areas in which State action is needed follows.

Improper Practices

The Taylor law contains provisions describing "improper practices" and grants to the State Public Employment Relations Board the "exclusive non-delegable jurisdiction" to establish procedures to prevent such practices. The law permits New York City's Office of Collective Bargaining to exercise jurisdiction over improper practices until March 1, 1970.

We firmly believe that this denial of jurisdiction to the OCB is clearly inadvisable, for it will unwisely complicate labor relations in New York City. For example, the same issue frequently arises in both representation and improper practices proceedings. Under present law, the OCB has jurisdiction in both proceedings and can resolve the issue in a single hearing. Denying the OCB jurisdiction over improper practices will require two separate proceedings before two Boards to resolve the dispute. The division will not only
duplicate hearings and prolong disputes, but will encourage "forum shopping."

To remedy the situation, the City will introduce before the City Council an amendment to the Collective Bargaining Law granting OCB authority over improper practices similar to that possessed by PERB. For such City Council legislation to be effective, it is necessary that the Taylor Law also be amended to allow the OCB jurisdiction over improper practices after March 1, 1970.

**Arbitration of Unresolved Issues**

Good labor relations policy suggests that solutions arrived at between the parties are better than those imposed by third parties. In recognition of this, the Taylor Law empowers public employers to enter into written agreements with recognized employee representatives setting up the procedures to be invoked in the event of an impasse in collective bargaining. Such agreements may include taking the unresolved issues to impartial arbitration. To further promote substantial equivalence with state law, the City will seek to amend its Collective Bargaining Law so that parties may agree to their own impasse procedures.

**Agency Shop**

Harmonious labor relations requires union security. We believe that the agency shop, a recognized form of union security, will promote labor harmony and responsibility. The City therefore supports legislation which will enable it to nego-
Bargaining Status of Certain Employees

The criteria for determining the appropriateness of a bargaining unit for public employees are set out in the Taylor Law. These criteria should be amplified with respect to the status of managerial and confidential employees, with appropriate emphasis given to the public interest issues involved.

Protection of Mediators, Fact-Finders and Arbitrators

Under the Taylor and OCB laws, mediators, fact-finders and arbitrators do not enjoy immunity from disclosure of information obtained in proceedings engaging them in their official roles.

The bargaining process is hindered if information divulged by the parties to a mediator, fact-finder or arbitrator is subject to later disclosure. The confidentiality of such information must be protected if the parties are to feel free to deal with each other through third parties. Therefore, the City recommends that the Taylor Law be amended to grant mediators, fact-finders and arbitrators immunity against disclosures of information received in the course of their professional duties.
Respectfully submitted,

John V. Lindsay
MAYOR
City of New York
APPENDIX D

Comparison of statements made in Personnel and the 1972 City Club publication, "A More Productive Workforce," regarding scope of bargaining and the practical impact clause of the NYCCBL (§1173-4.3(b))

NMAB Report pp. 67-68

The construction and utilization of an effective performance evaluation system, and the ability to participate in hiring decisions would work to increase the authority of the City's managers by giving them important management tools. Beyond these activities, the City should undertake to narrow the scope of collective bargaining in order to give City managers more control over work organization. The orthodox view of collective bargaining in the public sector is that wages, fringe benefits, and working conditions fall within the legitimate scope of collective bargaining, while decisions concerning the operation of government agencies are managerial prerogatives and therefore non-negotiable. However these prerogatives have gradually been eroded by municipal unions attempting to gain as much control as possible over the work situation of City employees. Understandably, to these unions, anything connected with the welfare, interests, or even preferences of public employees can be considered a suitable subject for collective bargaining.

A More Productive Work Force pp. 9-10

The 'scope of bargaining' defines the areas in which the city has 'the duty to bargain in good faith' and which under local laws are subject to ultimate jurisdiction of an arbitrator. This limits the areas in which the city may make decisions without the prior agreement of the unions and thus puts bounds on elected officials' mandate to govern and management's ability to manage. Included in areas subject to collective bargaining are: wages, pensions, health and welfare benefits, uniform allowances, shift premiums, hours, overtime, leave benefits and working conditions. Excluded are the city's decisions relative to: standards of service and selection for employment; direction of employees; disciplining employees; lay-offs for lack of work or other legitimate reasons; maintaining the efficiency of operations; methods, technology and personnel to perform work; the content of job classifications; and actions in emergencies. However, the Executive Order provides that 'the practical impact that decisions on (these) matters
The ability of the unions to bargain on subjects previously considered managerial prerogatives was strengthened in 1965 by Executive Order No. 52, which was actually intended to resolve some of the confusion and conflict which had arisen over the legitimate scope of collective bargaining. While Section 5c of the Order expressly exempted certain subjects from the scope of bargaining, it also stated that "the practical impact that decisions on (these) matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining."

The 'scope' has been further extended by the city's acquiescence to the demands of strong unions. A rare exception is the city's partial hold-out against the PBA's demands to completely limit the Police Commissioner's right to assign.

Amendment of Charter 1103 empowers the Mayor to enter into collective bargaining agreement which provide procedures 'governing the discipline, including removal, of employees of mayoral agencies'. This provision modifies 1173-4.3b, the 'management rights' clause. The conjuction of agreements in this area with the Civil Service Law would appear to decrease the city's capacity to manage.

Arbitrable grievances include disputes concerning: interpretations of collective bargaining agreements, personnel orders, section 220 (the section of the Labor Law dealing with prevailing wages), determinations affecting conditions of employment, rules and regulations of mayoral agencies affecting employees, job assignments, holding of an open competitive examination rather than a promotion examination, and classification matters, as well as disciplinary actions.

*/ Mayor's Executive Order No. 52/67.
productivity by changing work schedules to put more firemen and policemen on duty during the period when the most fires and crimes occur have been successfully opposed by the unions.

While improvements in management systems require the cooperation and input of labor to succeed, the scope of collective bargaining should be limited to reestablish the basic responsibility of City managers to manage their employees.

As the scope of bargaining has increased, the normal uncertainties of government decision-making have increased. Arbitrators may become the final authorities in government, subject only to the review of the courts. 'Decisions have been made [by the courts] which in effect mean that contracts [which may result from compulsory arbitration] supercede other statutory or charter provisions, ordinances, and rules and regulations of legally constituted rule making authorities, the impact of which tends to be the substitution of government by contract [or by arbitrator] for government by law.' */

Footnote renumbered]

*/ "Sorry - No Government Today" by Robert E. Walsh, p.176.
Administrative Order # 28

TO: All Administrators, Commissioners and Agency Heads

FROM: First Deputy Mayor John E. Zuccotti

RE: Agency Productivity Program

DATE: August 4, 1976

As you know, the City and the unions have agreed that COLA increases will be paid for by productivity savings. (This is detailed in the Memorandum of Interim Understanding). The agreement establishes a City-wide Joint Labor Management Productivity Committee to oversee the effort. However, the substance of the productivity program must initially be generated at the agency level. To develop and implement a meaningful productivity program in a timely and efficient manner, we are establishing a review process for each agency based on the City-wide model. A joint labor-management committee is to be established in each affected agency. Specific guidelines concerning membership, responsibilities and timing are attached.

The program tying COLA to productivity savings poses both a crucial test and a unique challenge. Real, demonstrable savings must be achieved that do not compromise agency performance. At the same time, established work rules and practices may be changed to achieve mutually desired objectives.

The first COLA payment is to be made OCTOBER 8. A schedule for meeting that deadline is attached. Time is short. Please submit the names of the co-chairmen of your agency productivity committee to the City-wide Productivity Committee staff by the end of this week. The staff will contact you to set up the first meeting in your agency. The staff will maintain liaison with you and apprise the City-wide Committee of your progress. I will also expect to hear from you at regular management meetings.

I understand that this is an additional burden; but the task is essential for both the City and its workers.

John E. Zuccotti
APPENDIX F

Ability To Pay In OCB Impasse Recommendations

The following are excerpts from a few impasse panel reports and recommendations which evidence the panel's consideration of "the financial ability of the public employer to pay" under the general concept of "the interest and welfare of the public," the language of §-173-7.0(c)(3)(b) of the NYCCBL.

I-85-72

Discussing the factors by which it was guided in making a salary recommendation, the impasse panel in the contract dispute between the City of New York and the Licensed Practical Nurses of New York stated, in its Report and Recommendations issued on October 17, 1972, the following:

"There are three other factors which I am obliged to take into account in making a salary recommendation. One is financial condition of the City, the second is the limitation placed upon allowable wage increases by the Federal Government Wage Guidelines and, finally, care must be exercised to maintain the relationship between the LPN's and other jobs with which they have been historically comparable, the Nurses Aides and the Registered Nurses."
The Report and Recommendations of a one member impasse panel in the contract dispute between the City of New York and Local 237, I.B.T., involving approximately 170 X-ray Technicians, six Radiation Technicians, thirteen Junior Technicians and eleven Supervisors of X-ray Technicians, employed by the Health and Hospitals Corporation, was released on December 19, 1972.

The panel stated:

"I have considered the arguments of both sides. I recognize that the basic obligation of the City is to pay its employees a fair wage comparable to that of other government bodies and of the private sector. I agree that the City's financial condition is a relevant factor although it cannot be the sole criterion in this proceeding. I also recognize that if a comparison is to be made with the private sector the value of fringes must be taken into account."

"In fashioning my recommendation I have taken all these factors into account. My recommendation is intended to balance the employees' right to comparable salaries, the City's need to be competitive and the restraints imposed by the City's financial condition and the Federal Wage Guidelines."
The Report and Recommendations of the impasse panel, released on June 19, 1973, in the contract dispute between the New York State Nurses Association and the City of New York and the Health and Hospitals Corporation, enumerated the following as guiding its recommendations:

"In formulating its recommendations, the Impasse Panel has weighed carefully the considerable evidence in the record concerning the relative wages, hours of work and fringe benefits of the registered professional nurses and personnel employed by the City of New York and by public and voluntary hospitals in the City and elsewhere. The Impasse Panel has also taken into account the overall compensation of registered professional nurses in the unit; changes in the cost of living; the interest and welfare of the public, including in particular the quantity and quality of the services rendered by the nurses to the population served the the Corporation, and including guidelines established by the Pay Board and Cost of Living Council, and the financial condition of the City and the Corporation; and such other factors as are normally considered in collective bargaining or impasse resolution."
In recommending settlement of the first collective bargaining agreement between the Community Action for Legal Services, Inc. and the Legal Services Staff Association, a one member impasse panel, in his Report and Recommendations issued on November 13, 1972, stated he was guided by the following criteria:

"As impasse panelist, my task is to make recommendations which satisfy the legitimate aspirations of LSSA to advance the interests of its members, the mandated objective of CALS to provide a meaningful legal assistance program for the poor of the City, the real concern of the City to coordinate the labor relations of CALS with that of other City agencies, and keep the program within the budget and standards of the OEO. Moreover, 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 and welfare of the public. This has come to mean the ability of the City to pay and the extent to which the services rendered may have to be curtailed if funds are unavailable."

"It is clear that if salaries and other costs are increased and the federal and the City governments fail to provide the funds to meet the increased costs, services may have to be curtailed. This would be unfortunate because it would mean not only that some poor people could not be served but that CALS would have to lay off some of its employees. A proposal which fully satisfies the legitimate objectives of LSSA, CALS, and City and OEO is not possible. My recommendations are, admittedly, a compromise intended to balance the conflicting interests and to have the least damaging impact on the quality and range of services rendered by CALS and the number of people it employs."
The Report and Recommendations of an impasse panel in the contract dispute between the City and the Marine Engineers Beneficial Association (MEBA), involving 140 licensed officers in the Department of Marine and Aviation employed by the City on its ferry boats, was released early in April 1975.

MEBA sought a panel recommendation that would provide a first year wage increase based on the dollar improvement of the negotiated pension change in the private sector harbor agreement.

In denying MEBA's request, the panel noted that the question presented to it is whether the panel should recommend a departure from the harbor pattern:

"It is our opinion that we should not. The ferry officers have reaped benefits from the harbor settlements when they were far in excess of what other City employees received. It is fitting that they stay with this pattern when it is less .... At no time did the City employees discount their wage demands to reflect the added pension benefits."

"MEBA sought to escape from the harbor pattern in 1970 but the recommendation of the Impasse Panel in that case did not grant it. Perhaps MEBA should not be bound forever to the harbor pattern but, in our opinion, this would be the wrong time to permit a change. The City is in serious financial condition. Any undue increase in the cost of an operation may force a reduction in service. The rumblings of a reduction in ferry service are already being heard. An increase for MEBA may mean lay-offs and the loss of jobs."
The Report and Recommendations of an impasse panel in the contract dispute between the City of New York, the New York City Health and Hospitals Corporation and the Licensed Practical Nurses of New York, Inc., involving 2863 Licensed Practical Nurses (LPNs) employed by the New York City Health and Hospitals Corporation, was released early in January 1975.

The panel noted:

"The City has been going through a steadily worsening financial situation, resulting in part from precisely the same causes as have produced the Association's rationale for the salary proposals here. It is appropriate take into account, in weighing the proposals of the parties and in developing a wage structure to recommend to the parties, the very troubled economic condition of the City, just as it is appropriate to take into account the effect of inflationary pressures on the pay rates of the City's employees."

"The Panel also notes the current series of articles in the New York Times regarding the adverse financial condition of the New York City Health and Hospitals Corporation, the employer of perhaps 80% of the employees in this unit. However sympathetic she may be to the argument advanced by the Association and however much she may recognize the hard work and contribution made by the LPNs to the health care services rendered by the City, she cannot consider that this is a time, when the principal employer is considered to be "bankrupt," to grant greater financial recognition to this unit of employees than has been negotiated elsewhere in the City."
The Report and Recommendations of an impasse panel in the contract dispute between the City and Local 768, D.C. 37, AFSCME, AFL-CIO, involving approximately 200 Traffic Device Maintainers (TDMs) employed by the City for the installation and maintenance of traffic control devices throughout the City, was released in January 1975.

The panel's wage recommendations recognized the need for improvement of the TDM's wage levels by an amount, based among other factors, upon increases in the cost of living, comparable to that accepted by other City employees.

The panel stated that it was guided by the following considerations:

"The City's financial burden is a condition which cannot be ignored. It has already had its impact on the relations between the City and its employees. For the first time since 1934, City employees are facing lay offs, and the prospect is that the number of lay offs will be increased in the near future. The lay off of City employees means that services rendered to the public by the City will be reduced. These are essential services, not services that may be dispensed with. The City has been on an austerity budget for some years, and it must be assumed that whatever services could have been trimmed away have already been accomplished. Up to now the reduction in services and employment has been accomplished by attrition, i.e., by failing to fill jobs that became vacant by resignation, death or retirement. Now that the City finds that attrition is no longer adequate."

"In the face of its financial difficulties, the City has nevertheless reached an agreement with many of its unions, including District Council 37, on a formula for wage increases to meet in part the loss of purchasing power suffered by the employees because of the double-digit inflation which has beset us. The unions that reached agreement with the City and have accepted the formula did so with the
reluctant recognition that there must be some belt tightening by employees as well as by taxpayers and the general public."

"A time of financial difficulty is not a time to accomplish needed reforms in the wage structure, especially if those reforms push the cost substantially beyond that accepted by other employees."
The Report and Recommendations of an impasse panel in the wage contract dispute between the City and the Patrolmen's Benevolent Association of the City of New York, involving approximately 23,000 Patrolmen and Policewomen employed by the City, was released on April 30, 1975.

The panel, discussing the "interest and welfare of the public" criterion, stated:

"The number and variety of job classifications and bargaining units in New York City creates a danger that an upowards adjustment in any one relationship will have unpredictable consequences among satellite and related job categories. This is not to say that preexisting structures are immutable. We mean only to assert that the public's interest in peaceful and orderly municipal employment relations argues against making changes in any one salary without proof of some marked change in previous conditions. This proposition is in no sense influenced by the presence or absence of "me-too" clauses in recently concluded collective bargaining agreements; the realities of labor relations are little modified by explicit contractual recognition that benefits won by one union are likely to shape the demands of others."

"In the present instance, the day-to-day work of the typical police officer in New York City has remained generally the same in recent years. Although the police training program has been elaborated, and although a larger number of officers now function actively in a police capacity than they did in the past, and although the legal restraints upon the peace officer have become more plainly enunciated, and although unemployment and social disorders may have increased the City's crime rate, nevertheless, the testimony before this Panel (including that given by the PBA's chief witnesses) is persuasive that the individual police officer's tour of duty has not changed very much."
"Nor does there appear to have been recent, ascertainable improvement in the job performance of police officers. One of the difficulties involved in measuring the value of police service to the public is the uncertainty as to what standard of performance should be applied. At any rate, the PBA has not demonstrated here that a heightened degree of police accomplishment warrants an increase in police compensation."

# # #

"Although we do not doubt the severity of the City's present economic plight, we cannot conclude that municipal employees are the best sources of relief or that they should be required to accept wages less than are just for services that the rest of the population desires to have. In this case, we do not think that the salaries the City is willing to pay are sub-standard. Hence, the issue of municipal finances is not in our judgement decisive here. Even if it were of larger significance, we would suggest that choices among desires must often be made if all cannot be fulfilled within the practicable levels of the City's income from taxes, fees, and other sources... The burden of management within the City's available resources should not be shifted to the shoulders of wage earners in the City's employ so long as other means of coping with municipal financial problems exist. One of those means is to end the employment of superfluous personnel in highly paid jobs including jobs within the PBA's jurisdiction."

# # #
In a February 1976 decision involving Research Scientists, a one-member impasse panel decided against awarding pay increases based upon the April 1975 offer by the Office of Labor Relations on behalf of the City in its negotiations with the union, pointing out that "Association, at its peril, elected to resist a negotiated pay settlement" and that the 8%-6% formula offered by the City at that time was not binding upon the impasse panel. The panel's discussion of the bases for its decision reads, in pertinent part, as follows:

"One of the major factors to be considered in all current pay increase disputes in City government is, of course, the unrelenting fiscal plight of the City. It is a time when consideration of pay cuts dominates all public discussion of City employee salary levels and possible alternatives to expense reduction through further layoffs of personnel."

The panel expressly conditioned implementation of its wage recommendations on compliance with applicable law, an obvious reference to the review powers of the EFCB.
The Report and Recommendations of the impasse panel in the contract dispute between the City of New York and Local 3, IBEW, AFL-CIO, involving approximately 196 employees in two titles, communications dispatchers and supervisory fire alarm dispatchers, was released on May 3, 1975.

In its discussion of its consideration of the union's demand for a wage increase, the panel stated:

"I am to be governed by the criteria that are set forth under the law. No specific weighting of these criteria is provided in the law and insofar as the fiscal plight of this City is concerned, it must relate to criterion number four dealing with the interest and welfare of the public. The interest and the welfare of the public are intimately tied in with the budgetary situation of the City of New York. I recognize that we are dealing with a small collective bargaining unit, but care must be taken so as not to set precedents which will react against the interest and welfare of the public in light of the fiscal situation of the City of New York. I do not believe I can divorce this criterion from the other criteria. Equally, with the other criteria, it is one which must be used to judge the merits of the situation. The other criteria are no more or less scientific, no more or less important in formulating the final recommendation."
The Report and Recommendations of the impasse panel, submitted on August 10, 1976, in the contract dispute between the City of New York and the Patrolmen's Benevolent Association, dealt with the issue of police officers' duty charts.

The panel noted:

"... The issue before us is much narrower. It has to do with an 8 hour as compared with an 8-1/2 hour day.

"Whatever the theoreticians may think in general about increasing the length of the day, we must be concerned with the circumstances involved in this particular dispute occurring at a time of critical financial distress for the City. Here, as we have stated, the highest priority should be given to maximizing the amount of street time for which patrolmen are available."

"New York has always been a pace setter in standards and working conditions, but it is not improper in a time of imperative need to bring City employees back to a standard comparable with those enjoyed in similar communities throughout the country."
The contract dispute, between District 1199, National Union of Hospital and Health Care Employees and the City of New York, involved approximately 300 employees in pharmacist titles in the Health and Hospitals Corporation.

The Report and Recommendations of the impasse panel, released on August 31, 1976, discussed the issues as follows:

"As to the principal matter at issue, pay increases in different forms, neither the Union or the Employer is in a position to relegate the secondary status the overpowering factor of the City's fiscal crisis. Regardless of the reasonableness of the outcome of a full comparative analysis of the pay and benefits of private sector and public sector Pharmacists, the paramount question remains whether this is an appropriate time to consider adjusting public sector Pharmacists' pay to deal with any inequity that might be found to exist. Similarly, regardless of any validity in the argument that employees in the very same title and doing the very same work ought not to be paid at significantly different pay levels, the unavoidable question still is whether the Employer's finances permit at this time any substantial allocation of funds to deal with any such intra-title inequity as may exist. The record in this case, as in many other similar impasse proceedings, does not permit a conclusion that any significant pay adjustments over and above general formula levels are justified. Moreover, the uncertainties facing the Employer and these employees alike warrant the conclusion of a one-year contract for Pharmacists. Such a contract can enable the parties to respond more flexibly to new developments that may have a bearing on the work, pay and benefits of Pharmacists employed in municipal hospitals. There are risks as well as advantages in a short-term contract; the potential advantages to both sides appear in this case to outweigh the potential disadvantages."

"A review of the pay history of employees in the Pharmacists' titles and of the pay and benefits of those similarly employed in voluntary hospitals and drug stores under contracts held by the Union does not suggest that the City's Pharmacists have fared badly in collective bargaining. That they continue to seek improvement in their economic status and terms of employment is understandable."
"However, the Employer's present financial plight, as evidenced in many dramatic and unprecedented ways -- including massive layoffs (involving many employees in municipal hospitals), reduced benefits, and postponed implementation of previously negotiated pay increases -- has compelled a moderation of response to normally justified or persuasive grounds for pay adjustments; these by no means resemble normal times in the history of New York City. Yet, while the City in general suffers, many of its employees are required to meet the rising costs of essentials and taxes, imposing upon them and their families a specific manifestation of the burdens of the general increase. Despite the burdens of City government, some minimum recognition of the economic needs of useful employees performing vital services is warranted. On this basis, it appears to the Panel that certain "formula" pay adjustments applied elsewhere to employees of the City are appropriately applicable to employees in the Pharmacist titles."

"It is with these extraordinary and powerful constraints in mind that the Panel can only find grounds for a "formula" general pay adjustment, a "formula" COLA adjustment, and a minor increase in the guarantee for those who are promoted to higher titles, and for a one-year contract."
October 15, 1976

Hon. Paul O'Dwyer
President
City Council
City Hall
New York, New York 10007

Dear Mr. O'Dwyer:

It has been suggested by Counsel to the Charter Revision Commission that our concerns over the timing of implementation of §1178 of the new City Charter be conveyed to you formally to the Commission. This is part of the larger problem involving the construction of §1178 which was raised earlier and deferred for further discussion with the understanding that legislation might be secured to postpone implementation until some resolution could be reached. Implementation of §1178 on January 1, 1977 would severely undermine the whole labor relations structure presently existing in New York City.

In 1967 the New York City Collective Bargaining Law established the Office of Collective Bargaining. Prior to OCB's existence the City's Department of Labor handled the certifications awarded to labor organizations who represented City employees. At the time OCB was created there were more than 400 certified units of employees. Given this unwieldy number of units, a major effort was undertaken to combine units to promote more stable and efficient labor relations in the City of New York. The fact that the number of bargaining units was decreased in September, 1976 from 121 to 114 is indicative of the ongoing attempts in the certification area.
This consolidation process can be reflected in another way. Presently, the City has 133 contracts with municipal labor organizations which expire as follows:

111 - contracts expired prior to 6/30/76 covering 193,560 employees;
21 - contracts expire on 12/31/76 covering 10,240 employees;
1 - contract expires after 1/1/77 covering 213 employees.

All but one City contract, therefore, will expire before §1178 comes into effect and negotiations must be conducted on the basis of the existing bargaining units.

Implementation of §1178 as of January 1, 1977 would mean that OCB would have to restudy, reevaluate and reformulate all of its decisions and criteria in order to comply with this Charter provision since supervisory and professional employees are currently represented by the same union in the same unit as are nonsupervisory employees. Since §1178 does not come into effect until January 1, OCB would not even become invested with formal jurisdiction of the subject except after action which could not even be initiated until that date was past. It is conservatively estimated that should supervisory employees be placed in separate units from nonsupervisory employees the number of units would at least double and, more likely triple or quadruple. Thus, it is impossible to accomplish this task prior to January 1, 1977, and, in contemplation of law, that is the date for the commencement of the process.

Furthermore, implementation of §1178 on January 1, 1977 would place all the present bargaining in jeopardy because the parties would, of necessity, have to reevaluate the issues, policies, benefits, and bargaining strategies if supervisory employees were to have separate contracts from nonsupervisory employees as of January 1, 1977.

In short, the only possible conclusion which this synopsis permits is that labor relations in New York City will be chaotic if §1178 is implemented on January 1, 1977. Except for one contract covering 213 employees, all employees will be working under expired contracts with no clear indication as to when bargaining can occur, what units they will be in or even who their representatives will be. Moreover, the literal implementation of §1178 would have a grave impact on the ability of the parties, both City and unions to carry out their obligations under the Memorandum of Intention.
APPENDIX G - cont'd.

Hon. Paul O'Dwyer

-3-  October 15, 1976

the City's financial plan and the Seasonal Financing Act. During the last session, legislation was introduced in the State Legislature, to deal with this immediate problem. The Commission did not oppose this legislation. In addition, it was contemplated that further discussions would be held by members of the Implementation Committee in an effort to reach a workable construction of §1178 that would be acceptable to all concerned. The undersigned still wish to work towards that goal.

For the foregoing reasons local legislation will be submitted shortly to the City Council. This legislation, a copy of which has been given to Counsel for the Charter Revision, would exclude from the ambit of §1178 contracts beginning on or before January 1, 1977. These are the contracts which are now or shortly should be in bargaining. It is expected that all such contracts will expire on June 30, 1978. Support by the Charter Revision Commission of this legislation will help maintain stability in labor relations in New York City during these trying fiscal times.

Very truly yours,

[Signature]

JOHN T. BURNELL, Director
Office of Labor Relations
City of New York

[Signature]

ARVID ANDERSON, Chairman
Office of Collective Bargaining

[Signature]

VICTOR GOTDUAM, Chairman
Municipal Labor Committee
RECEIVED FOR ACTION
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