NYSNA v. City & HHC, 11 OCB 2 (BCB 1973) [Decision No. B-2-73 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

DECISION NO. B-2-73

NEW YORK STATE NURSES ASSOCIATION

DOCKET NO. I-94-72

-and-

THE CITY OF NEW YORK and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

DECISION, ORDER AND DETERMINATION

On September 25, 1972, the parties filed a joint request for the appointment of an impasse panel herein.[1] A panel (Daniel Collins, Chairman, Eli Rock and Thomas Christensen) was appointed on October 19, 1972, and held its first hearing on November 16, 1972. At that point, questions as to whether a number of items are subject to impasse procedures arose and hearings were suspended.[2]

Pursuant to a policy of expediting impasse procedures, adopted by the Board on December 11, 1972, the instant matter has been the subject of discussions between the Office of Collective Bargaining and the parties for the purpose of finding means of dealing as promptly as possible with impediments to the resolution of the impasse in bargaining.

[1] A complete chronology of events subsequent to the request for appointment of the impasse panel is attached as an appendix hereto.

[2] Under §1173-7.0c(3)(c) of the NYCCBL, impasse panels are confined to the consideration of matters within the scope of bargaining, i.e., mandatory subjects of bargaining and subjects included in the bargaining by consent of the parties.

Through the cooperative and constructive efforts of the parties it was found that the matters at impasse could be divided into three categories, namely, items which were concededly mandatory subjects of bargaining, so-called professional items and items as to which the question of bargainability had to be resolved; it was further agreed that these categories of issues could be dealt with concurrently. Accordingly, the items concededly within the scope of bargaining were referred directly to the impasse panel which resumed hearings on January 2, 1973; the so-called professionals items were submitted, by agreement of the parties, to further discussion and mediation on the understanding that if not thereby resolved they might thereafter be submitted to the Board on the scope of bargaining question; the issues upon which determination of the question of bargainability were currently open were retained by us for resolution and are the subject of this decision. Those items are titled as follows (the Roman and Arabic numeral designations are those employed in the list of demands drawn up by the Association and included in a letter dated June 15, 1972, from Ms. Eileen McCaul on behalf of the Association to Mr. Herbert Haber, Director of the New York City Office of Labor Relations and Dr. Joseph T. English, President of the New York City Health and Hospitals Corporation):

Roman numbered items

V.	Appointment to Position
VI.B.	1. In Service Education 2. Continuing Education 3. Tuition Refund
X.	Hours
XVIII.	Maintenance of Competitive Wage Rate
XX.	Grievances
XII.	Differential for Work in a Higher Classification; and
XIX.	Promotional Guarantee

These last two items are concededly bargainable and are before the impasse panel except to the extent that they affect, respectively, the questions of rates of pay for non-unit work and promotions to non-unit titles; these latter two questions are disposed of herein.

Arabic numbered items

1. Notification of New Hires
4. Notification of Disciplinary Actions
5. Seniority Roster
6. Posting Work Assignment Schedule
7. Educational Leave
8. Housing Fund
9. Health and Safety Standards
11. Agency Shop
12. Joint Security Committee

Our decision herein deals with scope of bargaining as well as with appropriate levels of bargaining[3] and is based upon §1173-4.3 of the New York City Collective Bargaining Law which reads in pertinent part as follows:

"§1173-4.3 Scope of collective bargaining; management rights.

a. Subject to the provisions of subdivision b of this section and subdivision c of section 1173-4.0 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions, except that:

(2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved;

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[3] Registered Nurses as Career and Salary Employees are covered by the city-wide contract.

DISCUSSION

Item XII (Differential for Work in a Higher Classification) and Item XIX (Promotional Guarantee) were referred directly to the impasse panel by agreement of the parties; the Board, however, retained the related questions as to the bargainability of differential rates for non-unit work[4] and for promotions to non-unit titles. As to Item XII, we find that whatever work unit employees are assigned to, the only legal means for determining their compensation for such work is through collective bargaining. The Association is the collective bargaining representative of all employees in the unit and bargains for all work performed by such employees and all wages paid them; it may not bargain for rates of pay outside of the unit for which it is certified, however. The employer may assign its employees as it sees fit; but it may not avoid its duty to bargain on the demand that "all nurses serving at a higher title . . . be compensated as such." We, therefore, find that bargaining for all wage differentials based upon work assignments is mandatory; that the Association may bargain on behalf of unit members, for payment to them for non-unit work at rates equal to those paid to employees regularly engaged in such work; and that the demand as stated,[5] is bargainable. No judgment on the merits of the demand is to be inferred or implied.

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[4] Questions as to whether unit employees actually perform non-unit work and the legality of such work assignments under Civil Service Law or the rights of employees to protest out-of-title work assignments are not at issue here and, consequently, are not passed upon in this decision.

[5] The demand reads in pertinent part: "XII Differntial for Work in a Higher Classification We demand that all nurses serving at a higher title to be compensated as such." We do not pass upon the bargaining rights if the work in a higher title is in a bargaining unit represented by another bargaining representative. In this matter the work outside the unit is at the managerial level.

As to the matter of promotional guarantee (Item XIX), we find that while the union may bargain for standards as to promotions within the unit, bargaining for "the appropriate level of that position based on the employee's length of service" (wages and seniority) would constitute bargaining not only for subject matters outside of the unit, but for employees who, upon accepting such promotions, would cease to be unit members. Accordingly, we find that the employer is not required to bargain on these subjects.

The city contends, with regard to a number of Association demands, that the matters are city-wide subjects of bargaining. Among these are the following:

V. Appointment to Position

"Written confirmation of appointment, promotion and transfer, including agreed upon salary and differential, shall be provided to the employee and the Association. A copy of personnel policies and the contract shall also be provided to the employee."

Numbered items

1. Notification of the Association in writing each new employee hired within ten days of the employment;

4. Notification of the Association in writing of all disciplinary action undertaken against any Registered Nurse represented by the Association.

The subject matter of Item V is dealt with, in part, in Article VIII §5 of the city-wide contract. The subject matter of numbered Item 1 is dealt with by Article XI, §4 of the city-wide contract. The subject matter of numbered Item 4 is not dealt with by the city-wide contract.

None of the cited City-wide contract provisions provides for the direct transmission of the information here in question to unit representatives. We find that the information sought in each of these items is reasonably related to the ability of a unit representative to bargain intelligently and to fulfill its duties of contract administration and of protecting the individual and collective interests of unit employees, We find, therefore, that these are appropriate and mandatory subjects of bargaining at the unit level as well as at the City-wide level for the respective purposes indicated here. This decision is not intended either to reduce the rights of unit employees under the City-wide contract or to limit or diminish the bargainability of these subjects at the City-wide level,

The Association demand No. XVIII was withdrawn by the Association as of February 21, 1973, on the basis of a settlement of the issue between the parties. Therefore, the Board need not pass on the scope of bargaining issue as it relates to that demand,

Item XX Grievances, is a demand whereby the Association seeks to negotiate the specific managerial title to be designated as the representative of the employer at one of the steps of the grievance procedure, Section 1173-4.2c of the New York City Collective Bargaining Law defines good faith bargaining, and, at subdivision 2, includes in the duty to bargain the obligation:

> "2. to be represented . . . by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;"

The decision of the Court of Appeals in Board of Education of Huntington v. Associated Teachers of Huntington, Inc., 331 N.Y.S. 2d 17 (April 1972), confirms our Decision No. B-12-71, Matter of City of N.Y. and Local 246, S.E.I.U., AFL-CIO, that grievance administration is a part of the process of collective bargaining. We construe the requirements imposed by §1173-4.2c of the NYCCBL thus to apply to grievance administration and oblige the parties to designate fully qualified grievance representatives. Bargaining on grievance and arbitration procedures is a mandatory subject of bargaining; the duty to bargain on this subject does not extend, however, to bargaining as to the titles of the individuals who shall be the respective representatives of the parties in administering the grievance and arbitration provisions ultimately agreed upon. The mandate to bargain on this subject imposes the requirement that the representatives be "duly authorized" to "discuss and negotiate" on such matters. We, therefore, find that the Association may not demand to bargain for designation, by title or by individual name, of the employer's grievance representative and that the city has no duty to bargain thereon.

In numbered item No. 5, the Association demands that the employer establish a seniority roster for unit employees and that employees have the right to protest their positions on the roster. The city maintains that this is a permissive subject of bargaining. In our decision No. B-4-71 (In re Assoc. of Building Inspectors), we held that the union's strict seniority demand for a pick-and-bid system for the rotation of assignments was in conflict with applicable provisions of Civil Service Law

and was impermissible for that reason. We said, further, however, that "the negotiability of seniority as a criterion for other purposes not limited by law or the reserved rights" was not determined by that conclusion. The general question of the bargainability of seniority was dealt with in an earlier decision, No. B-4-69 (In re D.C. 37), in which we held that "seniority is a subject within the scope of collective bargaining." Since no purpose in conflict either with Civil Service Law or with rights reserved to management has been shown to attach to the Association's demand here, we Will adhere to our ruling in Decision No. B-4-69, supra, and find that the demand for establishment of a seniority roster as stated[6] is a mandatory subject of bargaining.

Numbered Item 6, for the posting of work assignments, is objected to by the City as an infringement of management's prerogative to "direct its employees, determine the methods, means and personnel by which governmental operations are to be conducted . . . and exercise complete control and discretion over the organization . . . of performing its work." We see no such infringement in the demand. No participation in the decision making process is sought by the Association. It is asked only that management, once it has made its decision on the matter of work assignments, publish the information to those who are affected by it. We find that this demand relates to working conditions and that it is a mandatory subject of bargaining.

Another group of demands which the city maintains relates to city-wide bargaining includes the following:

[6] The demand reads as follows: "5 Establishment of a seniority roster for all Registered Nurses employed with a right of protest of seniority position by any Registered Nurse who believes that he or she has been improperly credited for prior time.

Item X hours - ". . . in light of the fact that the bulk of clerical and other employees employed by the City . . . work a 35 hour work week . . . we demand that such a tour schedule (a seven rather than an eight hour tour) be immediately implemented for Registered Nurses . . ."

Numbered Items

9. Health & Safety
The City of New York to assume a contractual obligation to observe all applicable health and safety regulations and take all such steps as are reasonably necessary to insure nursing health and safety,
and

12. Security Committee
The establishment of a Joint Committee between the Corporation and the Association to review security problems at each of the Corporation's facilities."

The current city-wide contract deals with each of the three demand items last above-mentioned. Articles II, III and IV of that contract deal with various aspects of the subject of hours, overtime, etc. Article VIII, §8, of the current city-wide contract deals with the subjects of Health and Safety and Security. In Matter of City of New York and Social Service Employees Union, Decision No. B-11-68, and in Matter of City of N.Y. and D.C. 37, AFSCME, AFL-CIO, Decision No.

B-4-69, we have held that hours, work week, overtime and related subjects are matters for city-wide bargaining and are not subjects for bargaining at the unit level. We, therefore, find that Hours, Health and Safety, and Security are subjects for city-wide bargaining and that, as we said in Decision No. B-11-68, supra, "as no unique or special considerations have been established" herein, are not bargainable by the Association. We thus reaffirm the principle set forth in Decision No. B-11-68 that where unique and special circumstances exist, bargaining may be had on the same subject at both the city-wide and unit levels, under §1173-4.3 of the NYCCBL, There is specific authorization for such dual bargaining in subdivision 2 which reads in pertinent part that although certain specified matters are to be bargained at the city-wide level:

> ". . .nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved;"

In connection with numbered Item 8 (Housing Fund),[7] we note the city's citation of NLRB v. Bemis Bros. Bag Co.,

[7] The demand reads as follows: "8. Establishment of a revolving fund in the amount of no less than $250,000 for City of New York to secure housing facilities adjacent to its hospitals so as to provide living quarters for Registered Nurses."

24 Labor Cases 1167, 771, and Seattle First National Bank v. NLRB, 65 Labor Case, ¶11, 821, on the point that housing is a condition of employment only where it is a necessity imposed either by the employer or by force of circumstances and constitutes a material or significant element of the employment. The city contends that both elements are lacking in this case. In American Smelting & Refining Co. v. NLRB, 70 LRRM 2409, Cert. denied, U.S. Supreme Court, 71 LRRM 2328, the court, noting the Bemis case, and distinguishing the facts of that case, stated that the question as to whether housing is a condition of employment is a question to be determined on the basis of the given circumstances of particular cases. In the instant matter, we find that the provision of various types of housing is a regular and even traditional practice with relation to nurses both in the private and the public sector, including the City of New York, and is, therefore, a mandatory subject of bargaining.

Numbered Item 11 is a demand relating to the Agency Shop. This matter is currently the subject of Board deliberation in Matter of Brower v. N.Y. Public Library, Docket No. BCB-138-72; Matter of D.C. 37 v. OLR, Docket Nos. BCB-139-72 and BCB-144-72; and is, consequently, not decided by us here, and may not be submitted to the impasse panel.

Item VI B of the Association's demands seeks agreement on:

1. In-Service Education - Employer maintained education program on duty time for all unit employees.

2. Continuing Education - Up to 10 days per year with pay for attendance at workshops, seminars, professional meetings and conventions. Reimbursement up to $500 for all costs incurred in attending such meetings.

3. Tuition Refund - Full tuition refund of all Registered Nurses taking approved education courses.

Item 7 of the numbered demands of the Association seeks the right for all unit employees to take up to one year of education leave.

After preliminary study of these matters, the Board, by letter dated January 12, 1973, requested that the parties submit further information with regard to the subject of continuing education. Responses were received on January 31, 1973.

All of these demands relate to the tradition, fixed not only in the dealings between these parties but generally with regard to the employment of nurses in both the public and private sectors, of fostering and encouraging continuing education of nurses. There is thus merit to the Association's contention that the matter of continuing education has unique significance for nurses relating to the nature of their profession, analogous to that which prevails in the teaching profession, which distinguishes them from other groups of employees for whom continuing education may be a more optional matter.

Having considered the supplemental submissions of the parties, we find that the employer's conceded practice of granting nurses a pay differential based upon the completion of studies above the minimum requirement level puts the Association's demand for tuition reimbursement in point with the Court of Appeals decision in Board of Education of Huntington v. Association Teachers of Huntington, Inc., 331 N.Y.S. 2d 17, (April, 1972). In that case the court held as follows on the question of the bargainability of tuition reimbursement:

> "The tuition reimbursement provision . . . clearly relates to a term and condition of employment. School Boards throughout the state pay teachers a salary differential for completing a specified number of credit hours above the baccalaureate degree."

We, therefore, find that bargaining on Item VI B 3 (Tuition Refund) is mandatory. As to other items in this group, we note that similar provisions have been included in the collective bargaining agreements for other titles, e.g. Licensed Practical Nurse, and have been granted to Association members in prior agreements; (see also our decision in Matter of City of New York and Social Service Employees Union, Decision No. B-11-68).

That decision dealt with demands for unpaid leaves for studies leading to educational pay differentials; daily released time for employees in specified titles to obtain high school or college diplomas or graduate degrees; paid release time for afternoon study in courses leading to a pay differential; and the amount of service required for each year of paid educational leave. While we did not hold specifically that these

were mandatory subjects of bargaining (the question before the board being the appropriate level of bargaining) we ruled as follows:

> These demands . . . involve considerations special and unique to classes of employees, and hence are within the scope of bargaining."

Bargaining on these subjects has been conducted on a voluntary basis, however, and not as a mandatory subject of bargaining. We find that demands for training during work time; for released time and reimbursement to attend meetings, conventions and seminars; and for extended leaves for educational purposes are matters which infringe upon management's prerogative under §1173-4.3 (b) and are, therefore, permissive subjects of bargaining. Irrespective of the merits of such arrangements, they are not required by the employer as qualifications for continued employment or for improvement in pay or work assignments. In this regard they differ from tuition refunds, which we have dealt with above, since employees' pay is directly related to the completion of degrees in approved courses.

ORDER AND DETERMINATION

For the reasons set forth above and pursuant to the powers vested in the Board of Collective Bargaining, it is

ORDERED, that decision on Association demand Item 11 (Agency Shop), be deferred pending decision of the issue in Matter of Brower v. N.Y. Public Library, Docket No. BCB-138-72, and Matter of D.C. 37 and OLR, Docket Nos. BCB-139-72 and BCB-144-72, now pending before the Board; and it is hereby

DETERMINED, that the following Association demands are within the mandatory scope of collective bargaining herein and may be submitted to the impasse panel:

Item V	(Appointment to Position)
Item VI B 3	(Tuition Refund)
Item XII	(Differential for Work in a Higher Classification to permit bargaining of the Association demand that "alll nurses serving at a higher title be compensated as such.")
Numbered Item 1	(Notification of New Hires)
Item 4	(Notification of disciplinary Action)
Item 5	(Seniority Roster)
Item 6	(Posting of Work Assignments)
Item 8	(Housing Fund)

and it is further

DETERMINED, that the following Association demands are not within the mandatory scope of collective bargaining herein and may not be submitted to the impasse panel except upon the consent of the parties:

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	Item VI B	1. In Service Education 2. Continuing Education
	Item X	(Hours)
	Item XIX	(Promotional Guarantee) (with regard to bargaining as to promotions to titles outside the unit.)
	Item XX	(Grievances) (as to Association demands that a particular person or title be designated as a management grievance representative.)
Numbered	Item 7	(Educational Leave)
	Item 9	(Health and Safety)
	Item 12	(Security Committee)

DATED: New York, N.Y.
February 21 , 1973.

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHMERTZ
M e m b e r

WALTER L. EISENBERG
M e m b e r

EDWARD SILVER
M e m b e r

HARRY FRUMERMAN
M e m b e r

THOMAS HERLTHY
M e m b e r

APPENDIX

CHRONOLOGY OF EVENTS SUBSEQUENT TO MEDIATION UNDERTAKEN BY DANIEL COLLINS, ESQ. DESIGNATED JOINTLY TO MEDIATION OF THE DISPUTE

1.	Joint request for impasse	9/25/72
2.	Appointment by OCB of impasse panel Daniel Collins, Chairman Eli Rock Thomas Christensen	10/19/72
3.	First impasse hearing	11/16/72
4.	Clarification of Nurses Association demands by letter from Michael Horowitz, attorney for Nurses Association to OCB	11/27/72
5.	Letter from Chairman A. Anderson to Nurses Association and the City requesting specific written positions on each of the items in dispute	12/20/72
6.	Nurses Association Response to A. Anderson letter requesting written position	12/28/72
7.	Request for extension of time by City re A. Anderson letter seeking position of parties	12/29/72
8.	Letter of clarification re issues from A. Anderson to Impasse Panel and the parties	1/4/73
9.	Nurses Association additional response to A. Anderson request for statements of position	1/10/73
10.	OLR response to A. Anderson request for statements of position	1/10/73

11.	Jan. 16, 1973 letter to Nurses Association, OLR and HHC from. A. Anderson	1/16/73
12.	OLR response to 1/16/73 letter from A. Anderson	1/30/73
13.	Nurses Association response to 1/16/73 letter from A. Anderson -	1/31/73
14.	Nurses Association withdrawal of Item XVIII	2/21/73