City v. DC37, 23 OCB 11 (BCB 1979) [Decision No. B-11-79 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-11-79

-and-

DOCKET NO. BCB-332-79

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.
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DECISION AND DETERMINATION

By letter of May 18, 1979, the City of New York raised the issue of the scope of bargaining of certain language proposed by District Council 37, AFSCME, AFL-CIO (DC 37), during negotiations for the 1978-1980 Blue Collar Agreement. The language at issue is the last sentence of a paragraph in footnote 2, Article III, §2 of the 1976-1978 Parks and Public Works Agreement between the City and DC 37. The paragraph, with the contested language underlined, is as follows:

> "In those instances in which incumbents in the titles listed in subsections (h) except Foreman of Gardeners and Park Foreman), (i) (except General Park Foreman), and (k) of this section exercise supervision over subordinates, the majority of whom. (excluding Group 'A' and Group 'B' Laborers) are subject to Section 220 of the Labor Law, such incumbents will receive the annual rates as set forth while exercising such supervision on a regular assignment basis. In the event the nature of supervision exercised on a regular assignment basis by such incumbents should change whereby the majority of subordinate personnel (excluding Group 'A' and Group 'B' Laborers) do not consist of employees subject to Section 220 of the

> "Labor Law, the annual rates for such incumbents shall then revert to those set forth in the Salary Plan herein above provided. Rate subject to further adjustment, effective as of the date a court ordered increase in the determined rates for Laborers becomes effective, if any such increase occurs, in the same dollar amounts of increase.

The City claimed in its letter of may 18 that the underlined language is "invalid" and "prohibited" because it constitues a parity clause.

The Union, by letter of May 22, 1979, stated its position that the disputed clause is a valid "differential" provision.

On July 6, 1979, the parties agreed to a schedule for the submission of briefs and reply briefs; pursuant to this schedule, the City and DC 37 submitted their arguments to the Board on July 30 and August 7, 1979.

Background

The titles covered by the Blue Collar Agreement includes employees in various supervisory and non-supervisory categories among which are those titles set forth in subsections (h), (i) and (k) of Article III, §2 of the contract. These are:

Climber and Pruner
Gardener
Swimming Pool Operator
Foreman of Gardeners
Foreman
Foreman (Highway Maintenance)
Foreman (Sewer Maintenance)
Foreman (Watershed Maintenance)
Foreman (Water Supply)
Senior Supervisor of Park Operations

As indicated in the language of footnote 2, employees covered by the contract are sometimes required to supervise employees subject to Labor Law §220. This statute, provides, in pertinent part, that wages paid to "laborers, workmen or mechanics" upon public works "shall be not less than the prevailing rate of wages". The prevailing rate is determined by the Comptroller of the City of New York upon a "verified complaint" filed by an interested person or by a majority public employee organization. Section 220.8-d provides that the employee organization shall represent the employees at any hearing conducted by the Comptroller to determine prevailing rates and shall be a party in any Article 78 proceeding brought to review the Comptroller's determination.

Consonant with the Section 220 structure for determination of laborers' wages is the provision in NYCCBL §1173-4.3 that:

> "(1) with respect to those employees whose wages are determined under section two hundred twenty of the labor law, there shall be no duty to bargain concerning those matters determination of which is provided for in said section;"

Laborers are represented by DC 37 and its affiliated locals pursuant to CWR-17/67.

As a matter of practice, the certified representative engages in discussions with the staff of the Comptroller's office prior to issuance of the wage determinations under Section 220, although these discussions are not collective bargaining negotiations required by NYCCBL §1173-4.

The parties have agreed that if the contested language is held to be prohibited by the Board, it shall be removed from the 1978-1980 contract.

Positions of the Parties

The City contends that the disputed language constitutes a prohibited parity clause because "it automatically ties the future resolution of compensation to the wage scale of another specific group." In support of its argument the City cites Board precedent[1], a PERB case[2] and a court decision.[3]

The City argues that under the contested language of paragraph 2 "the future resolution of the foreman's wages would be tied to a court determination on the wage scale for laborers (a separate bargaining unit), rather than the city's ability to pay and wages received by comparable

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[1] Lieutenant's Benevolent Association and City, Decision No. B-14-72.

[2] City of New York and Patrolmen's Benevolent Association, 10 PERB 3006(1977).

[3] Voigt v Bowen, 53 AD 2d 277, 385 NYS 2d 600, 2nd Dept. 1976).

employees 'generally'.... The factors which may lead to a court determination for a wage increase will, in all probability, have no relationship to the foremen."

Further, under the standard of ability to pay required to be considered by the court pursuant to Chapter 201, laws of 1978, "the court would have to take into account not only the cost impact of a wage increase for the laborers, but also for the foremen."

The City urges that the "inhibiting effect" of any provision guaranteeing that foremen would benefit from wage increases awarded by a court to laborers diminishes the rights of the laborers to achieve wage increases, because:

> "After concluding the proposed 'Blue Collar' Agreement, the City, in subsequent negotiations with the laborers, will, of necessity, consider the laborers' demands not on their merits, but on their impact on the previously negotiated Blue Collar Agreement."

The City contends that the fact that laborers' wages are determined by a court rather than by negotiations is immaterial as the court "would be limited to the terms of the previously negotiated arrangement."

Further, the City states that:

> "Although laborers covered by Section 220 of the Labor Law do not participate in traditional collective bargaining under the Taylor Law and the N.Y.C.C.B.L. for wages and salaries, there has been and still is, nevertheless, a process of bargaining which has been followed with

> "few exceptions in recent years. D.C. 37 and other unions meet with the City to discuss the economic issues, including wages and salaries, for the various labor groups and work out an economic package which forms the basis of a consent decree issued by the Comptroller. Thus, the clause which gives rise to the instant controversy will be an inhibiting factor or consideration in the discussions or negotiations between the Unions representing laborers and the City. In fact, the differential between the laborers and the foremen has eroded over the years. If the clause remains, it will inhibit the earlier process and encourage the Union to go to a litigated determination and then Court."

The City states that it is willing to negotiate with DC 37 concerning the inclusion of a wage reopener clause in the foremens' contract, and that pursuant to a reopener clause it would bind itself to discuss an increase for foremen "comparable" to any increase which might be granted to laborers in a court ruling. The City contrasts its willingness to negotiate comparability increases with the Union's insistence on a "guaranteed" wage adjustment. The City concludes that the language demanded by DC 37 "preempts any discussion of a comparable increase."

Finally, the City contends that inclusion in the contract of the contested language "violates the Financial Emergency Act in that it forecloses Financial Control Board approval of the entire contract" and in that the clause violates the Coalition Economic Agreement.

The Union states that the contested language has been in effect since July 1, 1967, and that it was included to preserve the "morale" of foremen and to foster "good management".

The Union argues that the rationale underlying the various court and administrative decisions which find parity clauses to be prohibited subjects of bargaining is not applicable to the instant case. The Union contends that in each case "the primary reason for disapproval was that the clause in question had the effect of substantially inhibiting or interfering with the collective bargaining process." Citing both BCB and other decisions, the Union argues that their results flowed from the fact that a bargaining unit which obtained a parity clause with respect to another unit which was to bargain at a later time inevitably interfered with the statutory rights of the latter unit to "untrammeled bargaining."

In the instant case, the Union contends, laborers do not bargain collectively over their wages and thus there "is no negotiation to be inhibited" by the disputed differential clause. The Union argues that:

> "the Comptroller's wage determination is one fixed wholly by statute, one that cannot be affected by and does not involve collective negotiation. Likewise the Court review and possible readjustment of the Comptroller's determination is based solely upon whether the Comptroller has accurately embodied the statutory mandate in fixing prevailing

> "wage. . . . Thus the Court cannot be 'restrained or coerced' in making its determination by the existence of the previously bargained guarantee to foremen that their supervisory increment will be maintained."

The Union argues that a clause similar to the one at issue herein was approved by the Court of Appeals in Niagara Wheatfield Administrators v Niagra School District, 404 NYS 2d 82(1978). Citing UFA and City of New York, BCB Decision No. B-14-72, the Union claims that the Board in that case approved a supervisory differential in a stated dollar amount and that the differential in the instant case is similar to the differential in the Blue Collar contract.

In response to the City's contention that the differential would not be arrived at in consideration of the City's ability to pay, the Union argues that court ordered adjustments in prevailing wage cases are rare and have a minute economic impact upon the City. The Union asserts that relatively few employees would be eligible for the supervisory differential and that the maximum potential cost would be negligible.

Discussion

The Board first discussed the issue of lock-step parity clauses in UFOA, UFA and City of New York, Decision No. B-14-72, where the Unions sought a parity provision guaranteeing a fixed differential of 3.0 to 3.9 in the

wages of Firefighters and Fire Lieutenants. Although not reaching the parity issue in that case, the Board discussed and endorsed the practice of comparability bargaining, and pointed out that comparability factors are provided for in the NYCCBL.[4]

In Decision No. B-10-75, the Board considered a demand of the Lieutenants Benevolent Association that:

> "The minimum salary for the Lieutenant title shall be 66 2/3% above the maximum salary for the Patrolman's title."

The Board held that:

> "to the extent that this demand seeks a lockstep parity or fixed ratio wage relationship with employees in a bargaining unit not party to these negotiations, it is not a mandatory subject of bargaining. Except for that limitation, and insofar as the demand seeks salaries in absolute dollar amounts, based in part, upon comparison with the salaries of any other group or groups of City employees, but without any provision for guaranteeing or maintaining a differential between the salaries of unit employees and those of any other group, the demand is mandatorily bargainable."

The reasoning of the Board was that while comparability bargaining uses traditional bench mark methods to bargain about wages, a lockstep parity clause is antithetical to free and uncoerced negotiations because it fixes wages in such a way as to interfere with the bargaining rights of employees in another unit. Lockstep parity clauses require that a fixed differential or ratio be maintained between the wages of the unit in negotiations

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[4] Section 73-7.0c (3) (b)

and the wages of another unit; the other unit is therefore precluded from negotiating wages relatively more favorable than permitted in the contractual parity clause.

In B-10-75, the Board cited with approval the City's position in the UFA, UFOA case that:

> "a parity clause . . . would constitute an improper labor practice because it would interfere with the bargaining rights of employees in the bench mark title who were represented by a different union, not a party to the parity agreement; would require the City to make automatic and unilateral changes in terms and conditions of employment; and would involve the City in assisting the contracting union to limit, control or otherwise adversely affect bargaining in the unit of benchmark employees."

The Board also cited the holding of PERB in City of Albany and Albany Perm. Prof. Firefighters Association, 7 PERB ¶3079 (1974), that a firefighters' demand for automatic increases to match those later obtained by the police unit was "not negotiable." PERB stated:

> "Such a demand concerns terms and conditions of employment outside their own negotiating unit. . . . Moreover, an agreement of this type between the City and one employee organization would improperly inhibit negotiations between the City and another employee organization representing employees in a different unit."

Finally, the Board quoted at length from a decision of the Connecticut State Labor Board in City of New London (Police Department), Case No.MPP2268, 505 GERR F-5(1973), which held:

> "where equality in future treatment is in question, then each of the groups sought to be equated has a statutory right to bargain about the point."

The City's brief cites a 1977 PERB case, City of New York and PBA, 10 PERB ¶3003 which is to the same effect as the Albany Firefighters case. PERB held that a parity agreement with one unit "seriously inhibits the second employee organization in its negotiations with the employer," and it determined that parity clauses were therefore prohibited subjects of bargaining.

This survey of applicable precedent makes clear that the Board disapproval of lockstep parity provisions is based on the requirement to protect the statutory bargaining rights of the unit which is proposed to be used as a benchmark and is not a party to the negotiations.[5]

However, the cases cited by the parties do not all conform to traditional labor law analysis.

In Voigt v. Bowen, 385 NYS 2d 600 (App. Div. 2nd Dept. 1976), the court considered whether a pay parity provision in a collective bargaining agreement between the City of Long Beach and the Long Beach PBA was illegal and unenforceable. The parity clause required "complete parity" of the Long Beach PBA unit with the Nassau County Police Department. In finding the clause illegal and unenforceable, the court confined itself to an analysis based on the line of cases beginning with Huntington and culminating in Susquehanna which held that public policy as

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[5] Bargaining on "wages" is mandated by NYCCBL §1173-4.3a

expressed, inter alia, in plain and clear statutory language, could constitute a bar to the negotiability of certain subjects. The Appellate Division then went on to examine the Taylor Law for indications as to the "public policy" provisions. Focusing on the criteria provided for consideration by police interest arbitration panels appointed pursuant to the Taylor Law to settle contract negotiations which had reached impasse, the Court pointed out that these criteria included general comparability factors as well as "the interests and welfare of the public and the financial ability of the public employer to pay."

The Court concluded that it must be assumed that these statutory criteria are also relevant at the collective bargaining stage prior to impasse, and further that these standards have been mandated upon any contract resolution not arising out of negotiations. Therefore, the Court held that a parity clause which forecloses consideration of the statutory criteria is "plainly, clearly and implicitly violative both of the Taylor Law and public policy." The Court stated:

> Here the dispute was resolved by making Nassau County's, and not the City's financial status a determinative factor. Likewise, instead of considering wages received by comparable employees "generally," the determination was limited solely to the wage scale of one specific group of employees. Those factors were not authorized by the statute and were unrelated to this bargaining unit. Such method carried the same vice as would an agreement to make a decision by lot. It was, in effect, an abdication of respon-

> sibility. Consequently, the 1975-1976 wage schedule dispute remains open for Taylor Law negotiation as it was never properly resolved. (see also, City of Albany v. Albany Permanent Professional Firefighters Assn., 7 PERB ¶7-3079)."

It is interesting to note that the Court cites the Albany case although it does not discuss PERB's rationale.

The decision in Voigt v. Bowen is not controlling in the instant case. We note that pursuant to a recent amendment to the Financial Emergency Act (Chapter 201, Laws of 1978):

> "(c) Any determination pursuant to article eight of the labor law or any agreement or stipulation entered into in lieu thereof which provides for an increase in wages or finge benefits of any employee of the city or covered organization shall, in addition to considering any standard or factor required to be considered by applicable law, also take into consideration and accord substantial weight to the financial ability of the city and or covered organization to pay the cost of such increase."
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> * * *
>
> (g) At any stage of any proceeding under paragraphs (a), (b), (c), (d) and (e) hereof or any appeal from an order or judgment therefrom, the board may intervene as a party on the issue of the financial ability of the city and or covered organization to pay the cost of an increase in wages or fringe benefits."

Thus, until these provisions expire on December 31, 1982, all §220 determinations must take into account the financial ability of the City to pay the cost of the wage increase, and a major objection of the Court in Voigt has been met. Further, unlike the facts in Voigt, there is a single employer in the case before the Board and thus a §220 determination would also consider data relevant to the financial condition of the employer of the foremen whose contract is at issue herein, Although the City contends that "[t]he factors which may lead to a Court determination for a wage increase will, in all probability, have no relationship to the foremen," it should be evident that, contrary to the City's argument, the factors leading to a wage determination for laborers will probably involve many of the same considerations as would apply in any judgment as to a fair wage for their supervisors.

The Union cites Niagara Wheatfield Administrators v. Central School District, 74 NY 2d 68, 404 NYS 2d 82 (1978) which reversed 54 AD 2d 498, 389 NYS 2d 667 (1976). Although these decisions seem to have some bearing on the instant case at first glance, they were litigated and decided as status quo cases and not as parity cases, and the decision of the Court of Appeals thus is not applicable to our determination construing the NYCCBL.

The litigation in Niagara Wheatfield arose under a school administrators contract for a term from 1973 to 1975 which provided that it would remain in effect until modified by subsequent negotiations. The contract also contained a clause tying administrative salaries to teaching salaries. During negotiations for a successor contract, the employer stated that it would not continue this parity clause beyond the stated term of the contract notwithstanding the status quo provisions therein. When the teachers negotiated an increase in salary, the administrators proceeded to arbitration with the employer on the issue of the employer's failure to comply with the parity clause of the contract. The arbitrator ordered payment of an increase to administrators based on the new increase in teachers salaries, and Special Term confirmed the award in an unpublished order.

The Appellate Division reversed and vacated the award on the ground that the status quo provision was void as against public policy because:

> "Such construction puts the Board at a serious disadvantage and requires it to negotiate upon petitioner's terms or continue indefinitely the compensation index contained in the 1973-1975 contract."
> (Emphasis in original)

The Opinion contains no reference to any question concerning the parity problem in a labor law context, and this was apparently not raised by the parties.

The opinion of the Court of Appeals reversing the Appellate Division and reinstating the judgment of the Supreme Court also confined itself to the public policy considerations of a contractual status quo provision. No mention was made of PERB parity cases and the labor law issues were apparently not raised by the parties. However, the Court did state:

> "In the case before us, we must first observe that the tie-in provision alone is not offensive to public policy. In fact, a tie-in provision similar to that here presented was statutorily required until 1971. (Education Law, 53103, repealed 1971.)"

Clearly, the Court was directing its attention not to the public policy issues relating to lock-step parity clauses as they affect the freedom of the benchmark unit to negotiate, but instead the Court was pointing out that tie-in provisions had not been condemned by the State Legislature. The Court saw the public policy issue in terms of the employer's freedom to negotiate and did not refer at all to the bargaining rights of the teacher's union. As to the employer's ability to negotiate effectively, the Court said it was not impaired if good faith negotiations of a reasonable duration resulted in a mutual agreement on administrators' salaries for the new contract term.

We shall not discuss at length the City's assertions that the contested language deprives the Financial Control Board of its power to approve the contract and that the language violates the Coalition Economic Agreement. Aside from the bare allegation made by the City, it has not been shown in what way the contract language affects the powers of the FCB under the Financial Emergency Act. Further, any allegations of contract violation may appropriately be raised pursuant to the remedial provisions contained in the contract alleged to be violated.

Conclusion

We reaffirm the Board's policy, as expressed in our prior cases, that lock-step parity clauses which interfere with the statutory collective bargaining rights of a unit not represented at the negotiations are unlawful under the NYCCBL. The instant case is not subject to that rule, however, since laborers are subject to Labor Law §220 and have no rights under the NYCCBL to negotiate on the subject of wages. Therefore, we find that the contested language is not a prohibited subject of bargaining.

D E T E R M I N A T I 0 N

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that the language proposed to be included in the 1978-1980 agreement between the parties is within the scope of bargaining between these parties.

DATED: New York, New York
October 9, 1979

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

MARIA T. J0NES
M e m b e r

I concur - FRANKLIN HAVELICK
M e m b e r

MARK J. CHERNOFF
M e m b e r

EDWARD J. CLEARY
M e m b e r

CONCURRING OPINION

I concur in the result reached by the Board, but take exception to the discussion of Voigt v. Bowen, 53 App. Div.2d 277, 385 N.Y.S.2d 60 (2nd Dept. 1976).

Although the Voigt decision may not be "controlling," as the Board's decision has it, that case stands for an important proposition in public employment labor relations: public policy requires that the opportunity to assert the financial interest of the public employer in bargaining be adequately protected. To find that the very narrow contract clause at issue in the instant case is not illegal per se, not a subject on which the legislature has prohibited bargaining, it is unnecessary to limit the significance of Voigt.

The Voigt decision may not be fully reconcilable with the Board's decision here. Not all the authoritative and persuasive precedents on a subject as complex as the scope of public sector collective negotiation fit together so neatly. But while Voigt may not be controlling, it is clearly relevant.

The rationale of Voigt cannot be reasonably read as applying only to situations in which the wages of employees of one public employer are tied to the employees of a second employer, although its conclusion was reached in a factual

context distinguishable from the case before the Board. Nor can the concern of the court in Voigt for the public employer's ability to pay be answered here by relying on the post hoc enactment of the 1978 Financial Emergency Act, which governs New York City wage determinations under §220 and otherwise, in a case involving a 1976 contract clause. Finally, the following statement in the Board's decision verges on rewriting Voigt and perhaps the Taylor Law:

> "Although the City contends that '[t]he factors which may lead to a Court determination for a wage increase will, in all probability, have no relationship to the foremen, it should be evident that, . . . the factors leading to a wage determination for laborers [under §220 and the Financial Emergency Act] will probably involve many of the same considerations as would apply in any judgment as to a fair wage for their supervisors [in bargaining or impasse proceedings under the Taylor Law and the Financial Emergency Act].
>
> (Emphasis supplied.)

Contrary to the Board's dictum that the Financial Emergency Act legitimized the Parks tie-in clause after the fact, it could be argued more forcefully that the Act requires a specific finding of ability to pay in the instant case as in all others subject to the Act.

Leaving aside that question, and others which might be raised about the tie-in clause, I do not believe that provision, under the specific circumstances of this case, conflicts so directly with public policy as to rise to the level of an illegal agreement. There is, as the Board states, no

impact of the Bargaining rights of the tied group of public

employees where, as with laborers whose prevailing rate wages are determined under §220, the do not have the right to bargain on wages.

However, all tie-in clauses, including the present one, involve a limitation of public employer bargaining authority and should be closely scrutinized as to their effect on the employer's bargaining rights. Simple categories (one employer vs. two; subject to the Financial Emergency Act vs. Exempt; etc.) Will not suffice, although such factors should be considered.

Thus both Voigt and Niagara Wheatfield, although reaching different results, stand for the same proposition. The extent to which a tie-in clause infringes on the government's obligation to make responsible decision in labor relations must be measured carefully in each controversy. Precisely how far is too far, is a question which remains to be answered.

FRANKLIN J. HAVELICK