DC37 v. City, 25 OCB 10 (BCB 1980) [Decision No. B-10-80 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
Petitioner,

DECISION NO. B-10-80

DOCKET NO. BCB-358-79

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

This matter concerns an improper practice petition filed on October 1, 1979 by District Council 37 (hereinafter D.C. 37 or the Union) alleging that:

> The issuance of Personnel Policy and Procedure No.653-79 ... violates [New York City Collective Bargaining Law] Section 1173-4.2a(4)-in that it was done unilaterally without bargaining with the [Union]. This policy supercedes current lateness policies and implements a bargaining proposal which was in large part put forward at the preceding negotiations but which was not agreed upon by the parties. Furthermore, the lateness policy encompassed in Personnel Policy & Procedure 653-79 constitutes a mandatory subject of bargaining.

The Union requests that the Board.:

> Stay implementation of the policy pending determination of the petition herein and rescind Personnel Policy and Procedure No.653-79.

The City of New York, appearing by its Office of Municipal Labor Relations (hereinafter the City or OMLR), maintains, inter alia, that it has no duty to bargain over the lateness policy and

denies that it has committed an improper practice.

BACKGROUND

Personnel Policy and Procedure No. 653-79 (hereinafter PPP 653-79) was issued by the Department of Personnel on September 7, 1979 and is entitled, "City-wide Employee Late ness Policy." The PPP sets forth, as a statement of "Policy," the following:

> The ave Regulations for most civilian employees provide for penalties for unexcused lateness to be determined by the head of each agency. A . survey of agency lateness regulations has shown that policies and practices vary.
>
> Agencies will incorporate the following procedure into agency rules, and will notify employees of the establishment of the procedure within 30 days of issuance.
>
> In cases where collective bargaining agree- ments contain provisions which conflict with this procedure, the agency should follow the contract procedure only with respect to those employees covered by the contract.

PPP 653-79 states:

> Employees not at their work locations ready to work at the scheduled time are late. Employees are expected to allow sufficient time for minor travel delays.

The Order allows:

> At the option of the agency head, a grace period of no more than five minutes may apply at the start of the workday. Late- ness will be determined from the original starting time so that if the grace period is five minutes, an employee whose starting time is 9:00 who reports to work at 9:06 is six minutes late.

The order requires, "Time lost due to unauthorized lateness shall be deducted from leave" and sets forth a procedure of conference with and warning from supervisors after specified numbers of occurrences of lateness, starting with the first instance of lateness. After six occurrences of unauthorized lateness, "the agency head will take dis- action under Section 75 of the New York State Civil Service Law, which may result in a reprimand, fine, suspension, demotion, or dismissal.

Article V, section 1 of the 1978-1980 City-wide Contract incorporates by reference the provisions of section 2.8 of the "Rules and Interpretations of the Time and Leave Regulations for Employees Who Are Under the Career and Salary Plan." The provisions state:

> Rule 2.8
>
> Penalties for unexcused tardiness may be imposed by the head of each agency in conformance with established rules of the agency. As a minimum, however, all unexcused tardiness both in the morning and upon return from lunch shall be charged to the annual leave allowance.
>
> 2.8 Interpretations
>
> A. Each agency head may determine for his/her own employees whether or not a grace period will be allowed for lateness, and what the duration of the grace period shall be.
>
> B. Unauthorized and unexcused early departure shall be treated as absence without authorization and shall be charged to paid leave.

> C. In cases of extreme weather conditions causing general breakdown of normal public transportation facilities, a central determination will be made as to whether lateness may be excused or early departure authorized without charge to leave balances. Agencies will be advised of such authorization by the Department of Personnel.

The New York City Collective Bargaining Law (NYCCBL), section 1173-4.2a(4) provides that it shall be an improper practice for a public employer or its agents:

> [T]o refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

POSITIONS OF THE PARTIES

City Position

The City denies the allegations concerning the nature of this controversy made by the Union in the improper practice petition except that the City admits that PPP 653-79 was unilaterally issued by the Department of Personnel on September 7, 1979 and is being implemented; The City maintains that it has no duty to bargain on the policy and procedures set forth in PPP 653-79 and, therefore, the Union's petition must be dismissed because it fails to state an improper practice. The City argues that the policy and procedure set forth in the Order are a "legitimate exercise of the City's managerial rights set forth at §1173-4.3b of the NYCCBL to direct its employees; take disciplinary action; and maintain the efficiency

of governmental operations." The City contends that the objective of the policy is a uniform procedure to deal with employee lateness and thereby maintain efficiency of government operations. The City believes that within its management rights it can "unilaterally establish a uniform procedure for dealing with attendance and tardiness for its employees so long as the contents of that procedure (are] consistent with provisions in existing collective bargaining agreements."

OMLR points out that PPP 653-79 expressly provides that where it and an existing collective bargaining agreement conflict, "the agency should follow the contract procedure only with respect to those employees covered by the contract." The City contends that PPP 653-79 is consistent with existing collective bargaining agreements and existing agency practice with regard to the grace period provision which "carries forward the principle contained in Section 2.8, Interpretation A of the Leave Regulations for Employees Who Are Under the Career and Salary Plan which is incorporated by reference in Article V, section 1 of the 1978-1980 City-wide Agreement." The City also claims that the graduated step procedure of conferences and warnings, which leads to disciplinary action for "chronic tardiness," is "consistent with the City's reserved managerial right to take disciplinary action" which was reserved by the City in section 2.8 of the Leave Regulations. The City further maintains that parts of the graduated procedure carry forward and are consistent with provisions of

existing collective bargaining agreements.

OMLR alleges that the graduated warning procedure is analogous to a procedure set forth in the "Absence Control Plan" implemented by the City in January 1978 without challenge by the Union herein. The City argues that just as the "Absence Control Plan" was implemented as a managerial right, without challenge from the Union, PPP 653-79 "is designated to obtain the same legitimate management objective, attendance, in a uniform and reasonable manner."

The City concludes that PPP 653-79 was promulgated as an exercise of its statutory management rights, that it therefore is not a mandatory subject of bargaining, that the City has no duty to bargain on it and that, accordingly, the improper practice petition should be dismissed without the need for further proceedings.

Union Position

D.C. 37 argues:

> The Policy alters previous practice and contractual agreements in such a way as to impact upon employee benefits (leave time) and procedures for discipline, and is therefore a mandatory subject which must be bargained rather than unilaterally imposed.

The Union contends that under Rule 2.8 of the Time and Leave Rules, and interpretations, which are incorporated by reference in the City-wide contract, agency heads were vested with discretion to establish and implement practice and procedures covering employee lateness, subject to specified

practices contained in some unit contracts. Agency heads could exercise their judgment, according to D.C. 37, to establish and determine the length of grace periods for employee lateness, to excuse tardiness in whole or in part and dock leave time for only the unexcused lateness, and to determine, based on the circumstances of each case, whether to bring charges against employees and impose penalties for lateness. PPP 653-79 eliminates agency head discretion in the following ways, the Union argues. It establishes a uniform five minute grace period. Regardless of circumstance, every instance that an employee is not at his or her work location ready to work at the scheduled time is defined as an "unauthorized lateness." The policy mandates docking of leave time regardless of excuse or circumstance and includes, in the time docked, the time of the grace period "if the lateness is as little as one minute in excess of the grace period." In addition, the policy institutes a mandatory "step by step discipline" and, after six occurrences of lateness, the procedure requires "automatic bringing of charges and imposition of penalties."

The Union argues that mandated, non-discretionary docking of leave time, which includes the time of the grace period, significantly alters annual leave benefits and must be bargained. The Union claims that the changes in disciplinary procedures for review and appeal of lateness and penalty are mandatorily bargainable. The Union recites as major changes

in the disciplinary procedures the elimination of informal review by the agency head of employee lateness and the circumstances of same, elimination of the practice of discretionary docking of time, by the agency, only for the unexcused period of lateness, elimination of the opportunity for an employee to obtain informal review and to offer reasons for lateness prior to imposition of penalty, and the significant reduction in the number of occurrences of lateness which triggers the formal bringing of charges. These major changes in time and leave practices must be bargained, the Union urges.

The Union also contends that the PPP represents an attempt to gain unilaterally what the City was not able to gain when raised during negotiations for the 1978-1980 Citywide contract. The unilateral alteration of the terms of the contract violates the NYCCBL, the Union maintains. D.C. 37 claims that under the City's "disclaimer" that the policy falls when it conflicts with existing collective bargaining agreements, any employee covered by the City-wide contract would not be subject to the PPP 653-79 procedures.

The Union dismisses the City's reliance on the lack of objection to the Absence Control Plan as having "no bearing whatsoever on the lateness policy herein complained of." D.C. 37 claims that the history of the Absence Control Plan, its relation to the City-wide contract, the Time and Leave Rules and past negotiations differs from the present program and that the absence plan does not seek to alter the City-wide

contract, Time and Leave Rules or current practices, unlike PPP 653-79.

The Union requests that implementation of PPP 653-79 be stayed, pending determination of the petition, and that thereafter the policy be ordered rescinded.

DISCUSSION

We have considered the pleadings of the parties and find that the focus of this dispute concerns interpretation of the lateness policy and rules and of contractual obligations. The parties' claims primarily concern alleged alteration of and conflict with the flexible and discretionary lateness policy and procedures provided in Rule 2.8 and interpretations by the detailed and mandatory policy and procedure regarding lateness stated in PPP 653-79, which the City maintains will not apply where it is in conflict with contractual procedures. At the heart of this case, we feel, are the competing claims of a right to act unilaterally and contractual limits placed on any such right.

On several occasions in the past when presented issues concerning management's right to act and its duty to bargain, we have considered private sector decisions interpreting the statutory duty to bargain under the National Labor Relations Act as a source of enlightenment in deciding disputes concerning the duty to bargain under the NYCCBL, but we have made clear that private sector precedents are

not binding in cases before the Board.[1] The NLRB has ruled, in a line of cases starting with Collyer Insulated Wire,[2] that an unfair labor practice charge concerning bargaining obligations under the Act and which is subject to, and resolvable by, a contractual grievance - arbitration procedure, should be deferred to the existing grievance - arbitration procedure where: the dispute arises within the confines of a stable collective Bargaining relationship and there is no assertion of respondent hostility toward the charging party; the respondent is willing to arbitrate the dispute under a broad grievance - arbitration clause which includes the dispute before the NLRB; and an issue of contract interpretation is the center of the dispute. While the NLRB has narrowed its holding in Collyer,[3] the Board has continued to apply a prearbitral deferral policy in cases alleging only a failure to bargain in good faith, in violation of National Labor Relations Act section 8(a)(5),and which meet the conditions stated above.[4] Public sector

labor boards in several jurisdictions have "adopted the deferral

---

[1] See, for example, Decisions Nos. B-1-72; B-18-75; B-21-75.

[2] 192 NLRB 837, 77 LRRM 1931 (1971).

[3]In General American Transportation Corp. 228 NLRB 808, 94 LRRM 1483 (1977), the Board ruled it would not defer to a grievance - arbitration procedures case alleging employer discrimination against employees in violation of LMRA §8(a) (3). In Texaco, Inc., 233 NLRB 43, 96 LRRM 1534 (1977), the NLRB held that it would not defer to a grievance-arbitration procedure a case alleging that the employer violated LMRA §§8(a)(1) and 8(a)(5).

[4] See, for example, Roy Robinson Chevrolet, 228 NLRB 103,94 LRRM 1474 (1977).

to arbitration doctrine followed by the NLRB.[5]

There is no claim in the instant matter that the City has committed an improper practice other than a violation of its duty to bargain under NYCCBL section 1173-4.3a nor is there a claim that the City's action was motivated by anti-union animus.

The Union essentially complains that PPP 653-79 violates existing contractual provisions and disciplinary procedures regarding lateness. The parties have a long established bargaining relationship and have agreed to a grievance - arbitration procedure to resolve disputes concerning application or interpretation of their contract.[6] Determination of the improper practice charge in this case depends on interpretation of contract (and specifically of Rule 2.8 and interpretations which are incorporated in the contract) and the lateness policy and procedures, including the third paragraph under the statement of "Policy" set forth in PPP 653-79 [quoted on page 2, supra] which, according to the City, provides that lateness procedures set forth in a collective bargaining agreement should be followed where the Order and a contract conflict. Moreover, the City, through its representatives on the Board, has indicated that it

---

[5] See, for example, City of Ocala v. IAFF, Local 2135 Florida Public Employee Relations Commission, 3 CCH Public Employee Bargaining §40, 754; In re Wayne County Road Commission, Michigan employment Relations Commission 1972 Op. 1935; re City of Trenton, New Jersey Public Employee Relations Commission 1975 Case No.76-10; PLRB v. Indiana County, Pennsylvania Labor Relations Board (1979), 3 CCH Public Employee Bargaining §41,057.

[6] 1978-1980 City-wide Contract, Article XV.

will arbitrate disputes concerning whether PPP 653-79 policy and procedures violate existing contracts. Thus, for the reasons stated and in the interests of promoting use of contractual dispute settlement machinery, we defer resolution of the instant matter to the binding grievance - arbitration procedure set forth in the parties' contract, with a retention of jurisdiction to insure that any prospective arbitration award is consistent with, and not repugnant to, the polices and provisions of the NYCCBL.

O R D E R

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

DETERMINED, that disputes concerning whether the provisions of Personnel Policy and Procedure No. 653-79 violate existing contracts should be submitted to arbitration in accordance with the grievance -arbitration procedure stated in the contract allegedly violated, and that the board of Collective Bargaining shall retain jurisdiction in all such matters for the purposes of hearing and determining whether the disposition of such matters is consistent with, and not repugnant to, the policies and provisions of the New York City Collective Bargaining Law; and it is further

ORDERED, that the petition filed herein by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, dismissed except to the extent that the Board has retained jurisdiction as

stated in the preceding paragraph.

DATED: New York, New York
April 9, 1980

ARVID ANDERSON
Chairman

WALTER L. EISENBERG
Member

VIRGIL B. DAY
Member

EDWARD SILVER
Member

EDWARD F. GRAY
Member

EDWARD J. CLEARY
Member

FRANKLIN J. HAVELICK
Member