DeMilia(Pres. of PBA) v. McGuire(Comm. of NYPD), City, 25 OCB 14 (BCB 1980) [Decision No. B-14-80(IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

SAMUEL DeMILIA, as President of the Patrolmen's Benevolent Association,

Petitioner,

Decision No. B-14-80
Docket No. BCB-370-79

- and -

ROBERT J. McGUIRE, as Police Commissioner of the City of New York and the City of New York,

Respondents.

This proceeding was commenced by the filing of a verified improper practice petition by Samuel DeMilia, as President of the Patrolmen's Benevolent Association (hereinafter "PBA"), on November 16, 1979. The City's time to answer was extended several times while the parties investigated the facts underlying the petition. The City filed its answer on January 30, 1980, in which it denied the material allegations of the petition, denied that facts constituting an improper practice had been alleged, and requested that the petition be dismissed. Despite repeated inquiry by the

Office of Collective Bargaining, the PBA failed to submit a reply to the City's answer.[1]

Positions Of The Parties

The PBA's petition alleges that police personnel in the Management Information Systems Division have been replaced by non-bargaining-unit civilian personnel.. The PBA contends that the replacement of bargaining unit employees by non-bargaining-unit employees not affiliated with the recognized union constitutes an improper practice pursuant to Section 1173- of the New York City Collective Bargaining Law (hereinafter "NYCCBL"). The PBA alleges that such replacement constitutes discrimination by the City against the union- It cites subdivisions (2), (3) and (4) of Section 1173-4.2 as being violated by the City's actions.

The City, in its answer, denies the allegations contained in the petition's statement of the nature of the controversy. Moreover, the City asserts that the petition fails to allege facts which, if true, would establish that the City has committed an improper employer practice within the meaning of the statute. For this reason, the City alleges that the petition fails to state a claim upon which relief can be granted.

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[1] This matter was discussed at an informal conference held at OCB on February 28, 1980, and a representative of the PBA was requested to ascertain the attorney assigned to this case and have that individual contact the Trial Examiner assigned by OCB. No response was received. Upon further inquiry, the PBA indicated it had misplaced the City's answer. On March 25, 1980, the Trial Examiner forwarded to the PBA a duplicate copy of the City's answer, together with a request that the PBA submit a written request for an extension of time to reply- Neither a reply nor a request for additional time has been submitted to this date.

The City also objects to the petition on the grounds the petition does not reveal any names, dates or concrete allegations to which the City can respond- The City contends that the PBA has failed to state the factual basis of its claim and has instead relied completely upon conclusory allegations.. The City argues that the petition should be dismissed for this additional reason.

Discussion

At the outset, we find that the PBA has failed to allege facts sufficient to provide a basis for us to determine that any improper practice has occurred.[2] The petition fails to indicate the date on which the alleged replacement of police personnel occurred and the names or number of employees affected thereby. In view of the City's denial of the al legations of the petition, it was incumbent on the PBA to allege facts with sufficient particularity to enable this Board to determine whether a factual dispute exists which might warrant the holding of a hearing.

Aside from the question of whether there has been a replacement of police personnel by civilian personnel, the PBA has failed to allege facts sufficient to show that there has been violation of the NYCCBL. Even accepting the PBA's limited factual allegations as true, it has not been established that these facts would constitute an improper practice under the law.

[2] The lack of a date makes it impossible for us to ascertain whether the petition herein was timely filed so as to give this Board jurisdiction to determine this matter. See Revised Consolidated Rules of the Office of Collective Bargaining §7.4.

In its petition, the PBA alleges that the City engaged in actions which are violative of subdivisions (2), (3) and (4) of NYCCBL § 1173-4.2a. These subdivisions provide that it shall be an improper practice for a public employer:

> "(2) to dominate or interfere with the formation or administration of any public employee organization;
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees."

The PBA has not demonstrated how a replacement of police personnel by civilians in the Management Information Systems Division would constitute domination or interference with the formation or administration of the PBA. The union does allege that a purported policy of:

> "...replacing a union unit with a non-union unit constitutes discrimination against the covered employee organization."

However, this is merely conclusory, and facts have not been alleged sufficient to make a prima facie showing that this is the policy of the City, or that the City is motivated by any anti-union animus. The PBA similarly has failed to allege facts which would indicate that any employee has been discriminated against for the purpose of encouraging or discouraging membership in, or participation in the activities of, the union. There is no allegation that any employee represented by the PBA has been or will be laid off, fired, or otherwise subjected to any hardship, as a consequence of the alleged replacement of personnel in the unit in question.

While the PBA also alleges an improper practice based upon a refusal to bargain in good faith, this contention is contingent upon a finding that the question of the replacement of the employees in question constitutes a mandatory subject of bargaining. The question of which personnel, police or civilian, should be assigned to perform the function involved here in, is one which, as we have recently noted in a similar case,[3] concerns the "methods, means and personnel by which governmental operations are to be conducted," matters which, by statute,[4] are within the City's management prerogative and thus are ordinarily not mandatory subjects of bargaining. The PBA's petition does not offer any grounds for limiting the City's discretion in this area.[5]

The PBA states:

> "Replacement of a union employee unit with non-police employees constitutes a deprivation and loss of an employee unit to the detriment of the union."

Nevertheless, the union does not explain how this alleged detriment suffered by the union imposes any obligation on the City not to exercise its management prerogative, or to bargain

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[3] Decision No. B-8-80

[4] NYCCBL 1173-4.3b

[5] We note that in a recent case challenging a transfer of duties from police to civilian employees in another area, the PBA expressed several possible bases for limiting the City's management prerogative- These bases have not been alleged in the instant case. See Decision No. B-8-80.

concerning the exercise of that prerogative. The PBA has not alleged nor submitted any evidence that its members have any exclusive right to perform the work in the Management Information Systems Division alleged to have been reassigned to civilian employees. As we have recently stated regarding the City's prerogative to determine the methods, means and personnel by which services are to be performed,

> "Any claim of right more directly to limit management's exercise of its statutory rights must be based upon clear and explicit management waiver whether in the form of contractual provisions, statutory limitations or a showing that the work belongs exclusively to the bargaining unit."[6]

In the absence of such a clear and explicit showing in this case, we cannot say that there exists any limitation upon the actions alleged to have been taken by the City in this matter.

For the reasons set forth above, we will dismiss the improper practice petition herein.

ORDER

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

[6] Decision No. B-5-80.

ORDERED, that the petition filed herein by the Patrolmen's Benevolent Association, seeking a finding of an improper practice on the part of the City of New York, be, and the same hereby is, dismissed in all respects.

Dated: New York, N.Y.
May 20, 1980

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD SILVER
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