District 2, 199, et. al v. HHC, Bellevue Hos. Center, 29 OCB 40 (BCB 1982) [Decision No. B-40-82(IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice

-between-

DISTRICT 2,199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Petitioner,

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, BELLEVUE HOSPITAL CENTER

Respondent.
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DECISION NO. B-40-82

DOCKET NO. BCB-571-82

DECISION AND ORDER

On February 17, 1982, District 1199, National Union of Hospital and Health Care Employees, RWDSU AFL-CIO ("Petitioner" or "District 1199") filed a petition alleging that the New York City Health and Hospitals Corpora (respondent'' or "HHC") engaged in an improper practice by creating the position of Out-Patient Department Nutrition Service Coordinator ("OPDNSC") without notifying or bargaining with District 1199, and by refusing to include such position in the collective bargaining agreement. On March 10, 1982, respondent filed its answer, urging that the petition was untimely filed and should, therefore, be dis missed. No reply Was submitted.

Positions of the Parties

District 1199's Position

District 1199, the certified bargaining representative for Dieticians, initiated the instant proceeding on February 17, 1982. For its statement of the nature of the controversy, District 1199 alleged that on or about October 1981, HHC created the aforementioned title unilaterally and refused to include the position in the collective bargaining agreement in violation of Section 1173-4.2a(4) of the New York City Collective Bargaining Law ("NYCCBL").[1] Accordingly, petitioner seeks a Board determination that respondent's actions constitute an improper practice as defined in Section 1173-4.2 of the NYCCBL, and an order directing respondent to:

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[1] §1173-4.2a(4) of the NYCCBL provides, in relevant part

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
>
> (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.

> ... negotiate with District 1199 concerning the creation of the position in question and to include the position in the collective bargaining agreement after negotiating on proper rate and conditions for the position.

HHC Position

HHC, for its first affirmative defense, alleges that two postings for the title Assistant Director were made, on November 1979 and March 1980 respectively. Each described the duties corresponding to the position of OPDNSC. An appointment was made on April 21, 1980, and the incumbent was officially assigned the in-house title "Out-Patient Department Nutrition Service Coordinator" in July of 1981. Since this proceeding was commenced on February 17, 1982, more than four months after the occurrence of any of the aforementioned events, the petition, it is urged, is time-barred pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("Rules").[2]

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[2] §7.4 of the Rules provides:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or and, public employee organization acting in their behalf or by a public employer together with a request to the Board for final determina tion of the matter and for an appropriate remedial order.

In addressing the substance of the petition, respondent maintains that the classification of titles and establishment of job specifications is a right assured to management by Section 1173-4.3b.[3] HHC draws support for this position from the Board's interpretation and application of this provision in Decision No. B-4-79, where we held:

> [T]he Corporation, acting in good faith, is free to create titles and promulgate appropriate job specifications for the performance of new functions.

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[3] §1173-4.3b of tho NYCCBL provides, in pertinent part:

> b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; 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 governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; 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. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

HHC maintains that absent a showing that the establishment of the new title was improperly motivated, there can be no basis for a finding of an improper practice. HHC further argues that "[t]he determination of which personnel should perform supervisory duties, and what the qualifications for such supervisory positions should be" is a legitimate exercise of such management right. Hence, it is urged, the appointment of an employee to a position and the designation of duties for that position are not matters with respect to which there is a duty to bargain.

Lastly, respondent maintains there has been a failure to state a claim for which relief may be granted in that the facts alleged in the petition, even if true, would not constitute an improper practice within the meaning of the statute. For all the foregoing reasons, respondent requests that the petition herein be dismissed.

Discussion

This Board finds that the petition fails to state a claim for which relief may be granted. In Decision No. B-3-69, this Board was asked to consider the right of the City, pursuant to Section 5c of Executive Order 52, to create new titles. In interpreting Section 5c, a management rights provision nearly identical to Section 1173-4.3b of the NYCCBL, we found that the prerogative to create new titles was, in fact, traceable to two rights:

> [U]nder §5c of Executive order 52, the creation of new titles comes under the right of the City to determine the methods, means and personnel by which governmental operations are to be conducted, as well as the right to determine the content of job classifications.

It may be true that the creation of a new title may, as might a promotion, remove an employee from a bargaining unit. This possibility was considered in B-4-79 where we acknowledged that

> [d]epending upon the circumstances, a promotion may place the employee in another existing bargaining unit represented by the union or a different union; it may place him in a title which has already been found managerial and thus permanently remove him from collective bargaining; or it may place him in a title where as here, there has been no determination by the Board of Certification as to bargaining status and thus remove him from collective bargaining until such a determination is made.

In none of these circumstances, however, is there an improper practice; for neither the creation of a new title nor the promotion of a unit employee to such a title can be said to violate any provision of the NYCCBL.

We have, of course, repeatedly held that the exercise of a management right is not limitless and is constrained in two significant respects. First, Section 1173-4.3b states that:

> Questions concerning the practical impact that decisions on these matters [of managerial prerogative] have on employee ... are within the scope of collective bargaining.

District 1199 has not alleged that the establishment of the new title has created a practical impact. Second, Section 1173-4.2(a) of the NYCCBL states:

> A. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
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> > (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 1173-4.1.[4]

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[4] Section 1173-4.1 provides:

> §1173-4.1 Rights of public employees and certified employee organizations. Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that nothing in this Chapter shall be construed to: (1) deny to any managerial or confidential employee his rights under section 15 of the New York Civil Rights Law or any other rights; or (ii) prohibit any appropriate official or officials of a public employer as defined in this Chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment, and to make recommendations thereon to the Chief Executive Officer of the public employer for such action as he shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

The burden of proving an improper practice is on the petitioner. In the instant petition, District 1199 has not even addressed the issue of improper motivation. Absent

either of the above circumstances, there can be no finding that the creation of a new title constitutes an improper practice.

We note, as we did in B-4-79, that in circumstances involving the creation of a new title, the proper procedure is for the unit representative to seek certification for the new title. We further note that in the instant matter, District 1199 has done so, and seeks to amend its certification to include the title "OPDNSC". Questions concerning the eligibility of an employee for inclusion in any bargaining unit and, if eligible, the appropriate unit placement. are properly raised before the Board of Certification. Should no such questions be raised, or having been raised should the Board nevertheless find that the addition of the newly, created title to the existing unit is appropriate, the unit representative would thereupon be entitled to bargain as to the terms and conditions of employment of the newly certified title.[5]

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[5] In Decision No. B-3-71 we held:

> New titles constantly are being added to existing bargaining units by decisions of the Board. When a contract has been executed covering an existing unit, the subsequent addition of a new titles does not reopen the contract as to the previously certified titles, nor does it automatically extend the provisions thereof to the added title. The effect of the addition is to establish the right of the certified representative to negotiate the terms and conditions of employment for the added title. Extension of the contract terms, or negotiation of specific terms covering the added titles, is a matter for the parties.

Based on the foregoing, we find that no violation of the New York City Collective Bargaining Law has been stated herein and we shall dismiss the petition.

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

ORDERED, that the improper practice petition filed in the instant case be, and the same hereby is, dismissed.

DATED: New York, N.Y.
October 21, 1982

ARVID ANDERSON
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EDWARD J. CLEARY
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EDWARD F. GRAY
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