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

THE CITY OF NEW YORK

DECISION NO. B-9-69

Petitioner,

and

DOCKET NOS. BCB-20-68
BCB-38-69

CIVIL SERVICE BAR ASSOCIATION

Respondent.
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A P P E A R A N C E S:

Reavis and McGrath, Esqs.
by James P. Durante, Esq.
for Petitioner

J. Lee Rankin, Corporation Counsel
by Joan McAvoy, Assistant Corporation Counsel
and
by Robert Pick, Assistant Director of Labor Relations
for the Employer

DECISION, DETERMINATION AND CONCLUSIONS

On October 24, 1968, Petitioner, Civil Service Bar Association, filed a petition alleging that the City of New York in violation of Section 1173-7.0a(l) of the New York City Collective Bargaining Law (NYCCBL), had failed and refused to commence collective bargaining with the Petitioner, as the representative of attorneys employed by the City; and that in violation of Section 1173-7.0c(3) (d) NYCCBL, the City had granted merit increases to employees in the collective bargaining unit during a period of collective bargaining, without consultation or negotiation with the Petitioner. The Petitioner also requested the Board of Collective Bargaining to resolve a disagreement between the City and the Petitioner over the question of whether merit increases are within the scope of bargaining under the New York City Collective Bargaining Law and Section 5(a) (1) of Executive Order No. 52 of 1967.

On December 16, 1968, the City filed its Verified Answer and the Petitioner filed a reply on December 23, 1968. On January 24, 1969, the Petitioner commenced another proceeding, BCB-35-69, alleging that the City had failed to commence bargaining promptly and to meet at reasonable times and places for the

purposes of bargaining. The City filed its Answer on January 5, 1969, and the Petitioner filed a Verified Reply on February 14, 1969. On April 9, 1969, the Board heard oral argument on the questions of whether or not merit increases are within the scope of bargaining, and whether or not the unilateral grant of merit increases by the Corporation Counsel violated the full faith compliance provisions of the NYCCBL. Petitioner filed a brief on October 21, 1968, a Reply Brief on December 23, 1968, and a Supplemental Reply Brief on April 18, 1968. The City's brief was filed on April 9, 1969, and a letter in reply to the Supplemental Reply Brief was filed April 24, 1969.

THE ISSUES

The major issues in this matter are:

1. Whether or not merit increases are within the scope of bargaining as defined in Section 5(a)(1) of Executive Order 52.

2. Whether or not the City granted merit increases during a period of negotiations, in violation of NYCCBL, Section 1173-7.0c(3)(d).

After considering the pleadings and arguments, the Board makes the following findings:

1. On August 23, 1968, Petitioner addressed a letter to the City's Director of Labor Relations requesting collective bargaining on behalf of the attorneys represented by the Association; the letter was acknowledged by the City's Director of Labor Relations on August 27, 1968; on September 27, 1968, Petitioner served a formal bargaining notice on the City.

2. On October 4, 7, and 8, 1968, certain Law Department Division heads announced that merit increases had been granted to certain attorneys in titles represented by Petitioner, effective July 1, 1968; that the decision by the Corporation Counsel to grant such merit increases was made on or prior to June 209 1968, when he submitted the necessary proposed budget modifications to implement merit increases; that Petitioner was not consulted in advance by the Corporation Counsel or by any of his representatives nor did Petitioner have any prior knowledge that the merit increases were to be granted.

3. On October 9, 1968, Petitioner's attorney telephoned and wrote to the Corporation Counsel protesting his unilateral action in granting the merit increases; that in the telephone conversation and in a subsequent letter dated October 14, 1968, the Corporation Counsel stated his understanding and belief that the determination of the amounts of merit increases and the selection of recipients thereof were the responsibilities and prerogative of his office and not a matter for collective bargaining; that the Corporation Counsel further advised Petitioner, by the October 14th letter, that if he were persuaded that merit increases were illegal, he would try at once to have them canceled.

4. The City's Office of Labor Relations, in January of 1969, advised the Petitioner that it was prepared to bargain over the procedures and criteria to be applied in granting future merit increases; Petitioner, however, did not accept such offer nor did the City ever indicate a willingness to submit any unresolved dispute over the procedures and criteria for the determination of merit increases to an impasse panel.

5. Certain other allegations have been made by Petitioner concerning delays in the commencement of bargaining, the furnishing of information necessary for bargaining, and the City's willingness to engage in bargaining; that the Board has taken notice of the fact that subsequent to such allegations, the parties have bargained, that the requested bargaining information has been furnished, and that an impasse panel was appointed on July 2, 1969, to resolve the contract issues remaining in dispute (Case No. I-42-69).

SCOPE OF BARGAINING

The City argues that the granting of merit increases is a management prerogative and not within the scope of bargaining under the terms of the Executive Order and the NYCCBL. Petitioner's argument is that merit increases are wages and, therefore, are included within the City's duty to bargain over wages, which is set forth in the Executive Order.

In the private sector, the courts have held that merit increases are wages, within the scope of mandatory collective bargaining, and that "unilateral action by an employer without prior discussion with the union . . . must of necessity, obstruct bargaining . . ." (NLRB v Katz, 369 US 736, 50 LRRM at 2182; NLRB v Allison & Co., 165 F 2d 766, 21 LRRM 2238; NLRB v Berkeley Machine Works, 189 F 2d 904, 28 LRRM 2176; Armstrong Cork v NLRB 211 F 2d 843, 33 LRRM 2789).

In NLRB v Katz, supra, the employer had granted merit increases after bargaining conferences in which the subject had been discussed. The Court rejected the employer's contention that as the increases were pursuant to a long-standing practice of granting quarterly or semi-annual merit reviews, they did not constitute refusal to negotiate, stating (50 LRRM at 2182):

> "Whatever might be the case as to so-called `merit raises' which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases."

Are these private sector tests applicable to public employment so as to govern this case? We are satisfied that the subject of merit increases requires a fresh look within the context of public service.[1]

The custom of granting merit increases to civil service employees has been widespread in New York City, and such increases generally have been considered separate and apart from bargaining over wage rates.

Under the Career and Salary Plan, which regulated the payment of competitive class employees after its adoption by the Board of Estimate and the City Civil Service Commission in 1954 (Board of Estimate Res. #1 of July 9, 1954), merit increases were treated quite differently from annual increments granted on the basis of seniority. Whereas the latter were automatic under the Pay Plan, merit increases were not specifically treated and remained discretionary with the City. Career and Salary Pay Plan, Board of Estimate Res. #498, June 23, 1955, §§ 5.5, 5.6.

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[1] cf §209 a (3) of the Civil Service Law (Art. 14, Public Employees Fair Employment Law) which approves this approach. That section provides that with respect, inter alia, to the determination of refusal by a public employer to negotiate in good faith, "fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent."

Of course, the persuasiveness of arguments supporting such bodies of state and federal law is by no means to be disregarded.

The promulgation of the Alternative Career and Salary Plan Regulations on March 15, 1967 (Personnel Order No. 21/67), whose application was thereafter to substitute for that of the Career and Salary Pay Plan Regulations where collective bargaining determined wage rates, did not significantly change the structure with respect to merit increases. The old automatic "increments" of the prior Career and Salary Plan structure were re-termed "service increases and "longevity increases" but merit increases were not specifically treated, except to distinguish them from other salary adjustments which were dealt with in that document:

> "VII. Merit increases. The granting of merit increases shall not adversely affect the right of the grantee to receive adjustments as authorized by the Implementing Personnel Order, subject to the limitations of applicable provisions of Law."

Furthermore, unlike service and longevity increases which are projected for periods of time up to three years and may thus be treated by ordinary budget procedures, merit increases are irregular in number and amount, and by their nature are generally granted in the fiscal year decided upon. This necessitates use of the budget modification procedure provided in §124(b) of the City Charter:

> "The mayor may during any fiscal year transfer part or all of any unit of appropriation within any agency to another unit of appropriation within such agency or part or all of any unit of appropriation which has not been assigned to any agency, to any unit of appropriation within any agency for the purpose for which such unassigned unit of appropriation was originally established. Each such transfer shall be published in the City Record and written notice thereof shall be given to the comptroller not less than ten days before the effective date thereof."

Since the funds used for merit increases for each agency are limited to unexpended funds already in the budget for that agency, the Bureau of the Budget, acting for the Mayor, holds a veto over the granting of merit increases in any agency where such grant may create inequities with respect to another agency for which unused funds may not be available. Thus, considerations involved in granting merit increases in the City are significantly different from those involved in other salary adjustments and also present problems not usually encountered in the private sector.

We conclude, therefore, in line with the Supreme Court's decision in NLRB v Katz, and the pertinent laws, regulations, and practices in City employment, that the procedures and criteria to be applied in determining eligibility for merit increases are within the scope of collective bargaining, but that the decisions whether or not to grant increases, and the aggregate amount thereof, are within the City's discretion, with the individual amounts to be determined by the City in accordance with the negotiated criteria and procedures. Claims that such procedures and criteria have been disregarded or misapplied may be raised and determined under applicable grievance procedures. Additional questions will be decided in particular cases, as they arise.

To define the scope of bargaining as including the decision to grant merit increases and the amount of the individual increases might so inhibit the individual department heads' exercise of their discretion as to lead to the practical elimination of merit increases. We are not persuaded, on the basis of present experience, that there are any compelling reasons why we should risk the discouragement of the granting of merit increases by department heads.

FULL FAITH COMPLIANCE

We now consider whether the Corporation Counsel's decision in June of 1968, to grant merit increases, which was announced after Petitioner had served a bargaining notice for a new contract, violated the "status quo" provision in NYCCBL, Section 1173-7.0c(3)(d). That section provides, in pertinent part:

> "(d) Preservation of Status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending thirty days after it submits its report . . . the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . . For the purpose of this subdivision the term 'period of negotiations' shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed."

In ruling on the question presented here, we find that an examination of the background of the matter is warranted. It is clear there had been an established custom and practice of granting merit increases such as those here in question. In fact, such increases had been granted by the Corporation Counsel to members of the Petitioner during the term of its most recent contract with the City. No objection thereto had ever been raised by Petitioner nor had Petitioner sought to bargain on the subject of merit increases when the last contract was negotiated (cf §1173-7.0a(3)).

We find merit in the City's argument that the chronology of events leading to the announcement of the merit increases in October throws significant light on the matter. The sometimes cumbersome procedures imposed by law upon public officials in the use of public funds were the chief factor in determining the date when these increases could be announced.

The employing agency had decided in June to grant the increases and at that time took the necessary and appropriate action to carry out its decision. Under all the circumstances herein, the fact that approval of this action was not received and announced until shortly after service of Petitioner's bargaining notice cannot fairly be interpreted as a lack of full faith compliance with the statute.

Here, unlike the Katz case, the past practice is based on statutory provisions and regulations; the decision to grant the merit increases antedated the collective bargaining negotiations; there had been no objections by Petitioner to earlier merit increases, and no prior attempt by Petitioner to negotiate procedures and criteria. Moreover, the City has stated its willingness to negotiate procedures and criteria; it is Petitioner which has insisted on a wider scope of bargaining than we have found to be within the mandatory area. The City's grant of the merit increases here -in question does not, therefore, demonstrate a lack of "full faith compliance" with the statute.

OTHER ALLEGATIONS

We have further decided that it would not effectuate the purposes of the act to conduct hearings or to make findings and conclusions on the charges in BCB-20-68 and BCB-35-69, which allege refusal to bargain in good faith

with respect to the commencement of negotiations, the furnishing of information, and the conduct of negotiations since negotiations have been conducted, and an impasse panel has been appointed to resolve the remaining dispute contract issues.

DETERMINATION AND CONCLUSIONS

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 subject matter of merit increases is within the scope of bargaining with respect to the procedures and criteria to be employed in determining eligibility for merit increases; but that the initial decision to grant merit increases and the aggregate amounts of such merit increases are within the discretion of the City, with the individual amounts to be determined by the City in accordance with the negotiated and agreed criteria and procedures; and it is

CONCLUDED, that the allegations in Case No. BCB-20-68 alleging failure of full faith compliance with respect to the granting of merit increases by the Corporation Counsel has not been established; and it is further

CONCLUDED, that an impasse panel having been appointed, it would not effectuate the policies of the NYCCBL to schedule further hearings and to make further findings and conclusions on the allegations of refusal to bargain in good faith in Cases Nos. BCB-20-68 and BCB-35-69.

DATED: New York, N.Y.
July 14, 1969.

ARVID ANDERSON
C h a i r m a n

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