

Schoenbrun v. City, 31 OCB 13 (BCB 1983) [Decision No. B-13-83 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice
Proceeding

-between-

ARNOLD SCHOENBRUN
(Fire Department Radio
Repair Mechanic),

DECISION NO. B-13-83
DOCKET NO. BCB-591-82

Petitioner,

-and-

THE CITY OF NEW YORK
(Office of Municipal Labor Relations),

Respondent.

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DECISION AND ORDER

Petitioner Arnold Schoenbrun filed a verified improper practice petition on May 3, 1982 in which he charged that the City of New York committed an improper practice by failing and refusing to implement certain provisions of a determination of the New York City Comptroller (hereinafter "Comptroller"), made pursuant to §220 of the Labor Law. The City, by its office of Municipal Labor Relations, submitted a verified answer to the improper practice petition. The petitioner failed to submit a reply.

Background

Petitioner is employed by the New York City Fire Department as a radio repair mechanic. The compensation

of employees serving in that title is the "prevailing rate of wages" as determined by the Comptroller in accordance with the provisions of §220 of the Labor Law.

Petitioner and other radio repair mechanics employed by the City filed complaints under §220 sometime in 1978. Following hearings held in August, 1978, the Comptroller issued a determination. objections to the determination were filed, and a proceeding pursuant to Article 78 of the Civil Practice Law and Rules was instituted in State Supreme Court, seeking a hearing on the filed objections. This court proceeding was settled pursuant to a stipulation in which the Comptroller agreed to conduct a new investigation and to hold further hearings. Following completion of the investigation and hearings, the Comptroller issued a new determination on September 8, 1980. This second determination was challenged in court, and was ultimately confirmed by the Appellate Division, First Department, on May 5, 1981. The petitioner herein was also a petitioner in that proceeding before the Appellate Division.

The Comptroller's determination established the prevailing rate of wages for the time intervals covered by the decision, and further adopted the supplemental benefits package (including medical and dental insurance, and pension plan) of the New York Telephone Company as

constituting supplements "in accordance with the prevailing practices in the locality " to be provided to all employees serving in the title.

It appears that petitioner does not challenge the City's payment of the prevailing rate of wages, in accordance with the Comptroller's determination. However, petitioner contends that the City has failed to implement all prevailing supplemental benefits, as specified in the Telephone Company contracts covering the years in question.

Positions of the Parties

Petitioner's Position

The petitioner alleges that the City has been requested and has refused to implement the terms of the Comptroller's determination, which petitioner characterizes as an "agreement" He argues that this failure by the City constitutes a violation of §1173-4.2(c) (5) of the New York City Collective Bargaining Law (hereinafter "NYCCBL"), which provides:

"The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

* * *

(5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement." (Emphasis added)

City's Position

The City contends that an alleged failure to implement a determination issued by the Comptroller of the City of New York, pursuant to §220 of the Labor Law, cannot constitute an improper practice as defined by the NYCCBL. The City observes that under §1173-4.2(a)(1) of the NYCCBL, the law provides that:

"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;..."

It is argued by the City that the Comptroller's determination relied upon by petitioner is not an agreement resulting from collective negotiations as provided in the NYCCBL, but rather a decision issued by a public official pursuant to §220 of the Labor Law. Since the City has no legal duty to negotiate the matters covered by the Comptroller's determination, asserts the City, its alleged failure to implement that determination cannot form the basis of an improper practice.

Additionally, the City submits that the petitioner's charge is barred by the statute of limitations. The City alleges that the Comptroller's determination, which is dated September 8, 1980, was confirmed by the Appellate

Division, First Department, on May 5, 1981. The City contends that the petitioner's cause of action accrued no later than the date of the Appellate Division's confirmation of the determination, yet the petitioner waited until May 2, 1982 to commence this improper practice proceeding. Accordingly, the City concludes that the improper practice petition was untimely filed and must be dismissed.

Discussion

Initially, we have considered the City's defense of the statute of limitations,¹ and have found it to be without merit. The petitioner does not challenge the correctness of the Comptroller's determination, but rather he claims that said determination has not been implemented in certain respects. The alleged failure to implement is of a continuing nature, and therefore, we find the improper practice petition to be timely.

However, we agree with the City that the alleged failure to implement a Comptroller's determination cannot form the basis of an improper practice within the meaning of the NYCCBL. The section of the law relied upon by petitioner, §1173-4.2(c)(5), defines certain elements of the City's duty to bargain collectively in good faith,

¹ Revised Consolidated Rules of the office of Collective Bargaining §7.4.

including the obligation to "take such steps as are necessary to implement" an agreement. A breach of the duty to bargain would constitute an improper practice under NYCCBL §1173-4.2(a)(4). But, the duty to bargain is not unlimited; its scope is defined by the clear provisions of the law.

A public employer is required to bargain only concerning matters which are within the scope of collective bargaining, as set forth in §1173-4.3 of the law. While that section requires bargaining generally on the subjects of wages, hours, and working conditions, it expressly limits the employer's duty with respect to employees, such as the petitioner herein, whose wages are set pursuant to §220 of the Labor Law. Section 1173-4.3(a)(1) provides:

"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;..." (Emphasis added)

The petitioner's claim is based upon a determination made by the Comptroller pursuant to §220 of the Labor Law. Clearly, the content of that determination is outside the scope of the City's duty to bargain. Therefore, the City cannot have committed the improper practice of refusal to bargain in good faith.

Moreover, the section of the NYCCBL relied upon by petitioner deals with the implementation of an "agreement". In the context of the law, an agreement results from collective negotiations between a public employer and a certified public employee organization. In contrast, a Comptroller's determination pursuant to §220 of the Labor Law results from an investigation and hearings conducted by a public official, in accordance with the statutory mandate to determine the "prevailing rate of wages" and "supplements". Thus, an agreement and a Comptroller's determination are the end products of two very different processes. For this reason, we find that the element of the duty to bargain in good faith which requires the taking of steps necessary to implement an agreement, is inapplicable to the implementation of a Comptroller's determination.

For the above reasons, the petitioner's improper practice charge must be dismissed. This dismissal is without prejudice to any right petitioner may possess to pursue his claim in another forum.²

² We note that while an alleged failure to implement determination under §220 of the Labor Law does not constitute an improper practice, it may fall within the definition of a grievance under NYCCBL §1173-3.0(0)(1), which provides that the term "grievance" includes:

"a dispute concerning the application or interpretation of the terms of ... a determination under section two hundred twenty of the labor law affecting terms and conditions of employment;...."

Such a grievance would be arbitrable under the provisions of the Mayor's Executive Order No.83.

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 verified improper practice petition filed by Arnold Schoenbrun be, and the same hereby is, dismissed.

DATED: New York, N.Y.
May 18, 1983

ARVID ANDERSON
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