L.1180 CWA, v. NYPD, et. al, 37 OCB 20 (BCB 1986) [Decision No. B-20-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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COMMUNICATIONS WORKERS OF AMERICA,
on behalf of its Local 1180,

Petitioner,

-and-

DECISION NO. B-20-86
DOCKET NO. BCB-828-85

NEW YORK CITY POLICE DEPARTMENT,
EDWARD I. KOCH, as Mayor, and
BENJAMIN WARD, as Police Commissioner,

Respondents.
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INTERIM DETERMINATION AND ORDER

On November 15,1985, the Communications Workers of America ("CWA" or "the union") submitted a verified improper practice petition, on behalf of its Local 1180, in which it is alleged that the City of New York ("City") violated sections 1173-4.2a(l),(2),(3) and (4) of the New York .City Collective Bargaining Law ("NYCCBL"), by unilaterally implementing a proposal that the Union had rejected at a special negotiations session.[1] On December 30, 1985, the City, by

[1] NYCCBL Section 1173-4. 2a provides as follows:

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

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its office of Municipal Labor Relations ("OMLR"), filed a motion to dismiss the improper practice petition and an affirmation in support thereof, asserting that the Union has failed to state a cause of action under NYCCBL Section 1173-4. 2a. On February 4, 1986, CWA filed an answer to the City's motion, together with an affirmation in support, maintaining that a cause of action has been stated.[2]

The Petition

CWA asserts that, on January 22, 1985, the Union and the City participated in a "special negotiations session" to resolve an out-of-title grievance previously filed by CWA on behalf of

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([1] continued):

> (2) to dominate or interfere with the formation or administration of any public employee organization;
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> (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;
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> (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.

[2] The time limits prescribed by sections 7.8 and 13.11 of the Revised Consolidated Rules of the office of Collective Bargaining for filing responsive pleadings were extended upon the consent of the parties.

Principal Administrative Associates, Level I ("PAA Is")

employed in the Communications Division of the New York City Police Department. Although the City admitted that PAA Is were performing out-of-title work, OMLR was unwilling to grant relief retroactive to October 3, 1983, the date on which the grievance was filed. Therefore, the Union rejected the proposed settlement. It is alleged that, at this point, OMLR agreed to consider the matter further and to contact the Union at a later date. However, according to CWA, the City never contacted the Union and, on August 16, 1985, unilaterally and without notice, implemented its settlement proposal, upgrading the grievants to PAA Level II.

Positions of the Parties

City's Position

The City concedes that, by upgrading the PAA-I positions that were the subject of the Union's grievance, it granted part of the relief requested by CWA. However, OMLR argues, it is no improper practice under NYCCBL Section 1173-4.2a unilaterally to grant part of the relief requested in a grievance. The City maintains that the grievance procedure affords the proper vehicle for remedying the Union's concerns in this matter and allows that CWA may "continue to grieve back-pay issues and-ultimately arbitrate these issues."

Based upon the above, the City asserts that the peti-

tion should be dismissed as it fails to state a prima facie claim of improper practice under the NYCCBL.

CWA's Position

CWA contends that the unilateral implementation of a settlement proposal under discussion at the bargaining table is a violation of the statutory duty to bargain in good faith. The Union further notes that the duty to bargain extends to the subject of the proposal at issue here, namely, wage rates. Thus, it is alleged, the City has, by its unilateral action, refused to bargain in violation of the NYCCBL. CWA requests that the Board find that the City has committed an improper practice and direct OMLR to refrain from unilateral implementation of bargaining proposals in the future. In addition, the Union seeks an apology from OMLR for its improper conduct.

Discussion

In ruling on a motion to dismiss, the facts as alleged by the petitioner must be taken as true.[3] In the present case, therefore, we must determine whether, assuming the facts to be as set forth above, CWA has made out a prima facie case of improper practice under NYCCBL Section

[3] See, e.g., Decision Nos. B-8-86; B-7-86; B-38-85.

1173-4.2a.

It appears that, in the context of settlement discussions relating to a pending grievance, OMLR conceded that the grievants were performing out-of-title work in violation of the 1982-84 collective bargaininq agreement between the parties. Efforts to settle the grievance broke down over the issue of appropriate remedy for the violation. Thereafter, without further discussion or notice to CWA, the City reassigned the grievants from PAA I to PAA II positions. CWA asserts that this action, which it characterizes as 'the unilateral implementation of a settlement proposal under discussion at the bargaining table,' constitutes a violation of the statutory duty to bargain in good faith.

It is, of course, true that grievance procedures are an essential part of the collective bargaining process and failure to conform to contractual requirements regarding grievance handling may constitute a refusal to bargain in the broad sense of that term. However, where a grievance is presented alleging nonperformance of contractual terms, management satisfies its obligations under contract and law if it considers the allegations in good faith, makes timely response, and stands ready to proceed to the next step of the grievance procedure and/or to arbitration if its conclusion is not

satisfactory to the grievant. Only where management refuses to process a grievance and thereby repudiates the contract will a claim of improper practice lie.[4]

Significantly, in the present case, OMLR indicated that it would be ready to grieve and, if necessary, to arbitrate the outstanding issue of retroactive pay for the grievants.[5] Moreover, we take administrative notice of the fact that the parties have recently designated an arbitrator to hear and decide this dispute.[6] Thus, it is clear that, far from repudiating the contractual grievance procedure, the City has taken steps to comply with that procedure insofar as the unresolved portion of the grievance is concerned.

CWA also contends that, by upgrading PPA Is to PAA TT without negotiating with the Union, OMLR has made a unilateral change in wages, a mandatory subject of bargaining, and has thereby violated its bargaining obligation under NYCCBL Section 1173-4.2a(4). Although the Union is correct

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[4] See, e.g., Addison Cent. School Dist., 17 PERB §3076 (1984)(arbitrary abandonment of any semblance of compliance with contractual grievance procedure held to constitute repudiation of contract in violation of Taylor Law Sections 209-a.l(a) and (d))

[5] Affirmation in support of motion to dismiss §8.

[6] See, Docket No. A-2254-85

in its assertion that wage rates are a subject concerning which there is a duty to bargain, an increase in wages that accompanies a promotion or reassignment does not implicate the duty to negotiate under the statute. CWA and OMLR are parties to an agreement which prescribes wage rates to be paid at each level of the PAA title.[7] Thus, we find that the City's obligation to negotiate concerning wages for PAA IIs has been fully discharged and we conclude that OMLR had no duty to bargain about wages before reassigning the grievants herein.[8]

However, this is not the end of the matter. For, as we stated above, grievance procedures are part of the collective bargaining process and fundamental to the collective bargaining process is the obligation of the parties - employer and union - to deal with each other at all times in good faith. Here, the parties voluntarily undertook to negotiate a settlement of a pending grievance. When settlement discussions reached a stalemate, the City advised the Union that it would consider the matter further and report

[7] Article III, Section 2.

[8] Of course, nothing herein prevents the Union from pursuing a grievance under the collective bargaining agreement if it believes that the upgraded PAAs who are the subject of the pending grievance are not receiving an appropriate wage under the contract.

back. Thereafter, without notifying the Union, the City up graded the grievants and increased their salaries, to which the Union responded by filing the instant petition.

In the context of the grievance procedure, of course, it is not an improper practice if the employer fails to respond to a grievance or takes such action as will limit its liability in the pending matter. The Union's recourse in such an instance is to advance its claim to the next step of the grievance procedure. Under the circumstances presented here, however, the parties had voluntarily suspended the grievance procedure in order to negotiate a settlement. At the time of the City's unilateral action, the Union was awaiting a response to its last statement of position in the settlement talks. under such circumstances, we cannot find that a union acts at its peril if it relies on the employer's representation and foregoes for an indefinite period of time the contractual remedy of proceeding to the next grievance step.

The essential thrust of the Union's case is that the City, having induced the Union to await further communication and having maintained silence for seven months, has, by acting unilaterally and without notice on the very matters thus held in abeyance, violated its duty to bargain. on the motion before us, we cannot find that the union has

failed to provide prima facie support for this position.[9] Accordingly, we shall deny the City's motion to dismiss the improper practice petition and shall direct OMLR to file an answer in this matter.

We recognize that there may be additional facts relatina to events occurring in the seven-month hiatus between the January grievance meeting and the August upgradings and wage increases which could have some bearing on our resolution of the improper practice charge. If so, the City should assert such facts in its answer.

For the reasons set forth above, we find that CWA has stated a prima facie claim of improper practice under NYCCBL Section 1173-4.2a(4). However, we find that no cause of action has been

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[9] We note that a violation of the duty to bargain in good faith may be found in circumstances other than strict collective bargaining negotiations. See, e.g., Pacific Southwest Airlines, 233 NLRB No. 10, 97 L RM 1329 (1977) (direct bargaining with employees); R.C. Cobb, Inc., 231 NLRB No. 19, 96 LRRM 1576 (1977) (unilateral change in terms and conditions of employment during contract term); Committee of Interns and Residents, Decision No. B-25-85 (unilateral change affect-inq terms and conditions of employment).

stated with respect to the alleged violations of NYCCBL Sections 1173-4.2a(1), (2) and (3), for there is no allegation that the City, with improper motivation, interfered with the exercise of rights granted

in NYCCBL Section 1173-4.1,[10] that it dominated or interfered with the internal affairs of the Union, or that it discriminated in any manner against any employee with respect to union membership or activity.

0 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 motion to dismiss filed by the City of New York be, and the same hereby is, denied; and it is further

[10] NYCCBL Section 1173-4.1 provides in relevant part:

> Rights of public employees and certified employee organizations. Public employees shall have the right to self-organize, 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.

DIRECTED, that the City shall serve and file an answer to the improper practice petition within ten days of receipt of this Interim Determination and Order.

DATED: New York, New York
March 31, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

JOHN D. FEERICK
MEMBER

PATRICK F. X. MULHEARN
MEMBER

SANDRA B. DURANT
MEMBER

CAROLYN GENTILE
MEMBER