UPOA v. DC37, et. al, 37 OCB 29 (BCB 1986) [Decision No. B-29-86 (IP)]

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

UNITED PROBATION OFFICERS ASSOCIATION,

Petitioner, DECISION NO. B-29-86

DOCKET NO. BCB-807-85

-and-

DISTRICT COUNCIL 37, AMERICAN FEDERATION
OF STATE COUNTY and MUNICIPAL EMPLOYEES

Respondent.
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DECISION AND ORDER

A verified improper practice petition was filed by the United Probation Officers Association (hereinafter "UPOA" or "petitioner") on August 16, 1985, in which it was alleged that an improper practice had been committed by District Council 37 AFSCME, AFL-CIO (hereinafter "D.C. 37" or "respondent") in violation of Sections 1173-4.2b(1) and (2) of the New York City Collective Bargaining Law (hereinafter "NYCCBL"). After several extensions of time were granted, the respondent's verified answer was submitted on September 16, 1985. The petitioner submitted an amended verified petition on September 26, 1986. An amended verified answer and a memorandum of law were filed by D.C. 37 on October 15, 1985. The petitioner did not submit a reply.

An informal conference was held on February 20, 1986, before a Trial Examiner designated by the Office of Collective

Bargaining (hereinafter "OCB"). At this time, the parties agreed to consider the possible voluntary resolution of the dispute. Board consideration of this matter was held in abeyance pending the parties' efforts to reach a settlement. In May, 1986, the petitioner verbally informed OCB that these efforts had been unsuccessful and that Board determination of this matter was required.

Background

Pursuant to §1173-4.3a(2).of the NYCCBL, certain subjects of bargaining which must be uniform for all employees subject to the Career and Salary Plan (hereinafter "City-wide issues"), may be negotiated only with the employee organization which is certified as the City-wide representative, as defined in the law. Section 1173-4.3a(2) provides:

> "(2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special

> and unique to a particular department, class of employees, or collective bargaining unit are involved;"

it is undisputed that D.C. 37 has qualified, and has been recognized, as the City-wide representative for purposes of this section.

In the course of its negotiations with the City for an economic package for the period 1984 through 1987, D.C. 37 also bargained over two City-wide issues: holidays and annual leave (vacations). The economic agreement concluded between the City and D.C. 37 in May of 1985 contained changes with respect to these two issues: a new holiday was added (Martin Luther King Day) and annual leave for newly hired employees was reduced. It is the negotiation of changes in these two City-wide issues which is objected to by UPOA in its petition.

Positions of the Parties

UPOA's Position

The UPOA asserts that D.C. 37 "bargained away" the vacation benefits of other units, including the unit represented by UPOA, in order to increase the D.C. 37 money package. The UPOA alleges that D.C. 37' s action was contrary to the conduct of previous City-wide negotiations, in that in the past, money issues and City-wide issues always were bargained separately. The UPOA contends that D.C. 37 bargained in bad faith and breached its duty of fair representation in violation of

§1173-4.2b(l) and (2) of the NYCCBL.

D.C. 37's Position

While acknowledging that its 1984-1987 economic agreement with the City contains provisions concerning the City Wide issues of holidays and annual leave, D.C. 37 denies that it "bargained away" vacation time of other units to increase its money package. D.C. 37 observes that under the agreement, current employees will not lose any vacation benefits and all employees, current and future, will gain an additional holiday, Martin Luther King Day. It is also noted by D.C. 37 that in the past, other City-wide issues, including health insurance, health and welfare benefits, and pension contributions, have been negotiated as part of bargaining over an economic package.

D.C. 37 asserts that UPOA's charge of bad faith bargaining is meritless, since the duty to bargain in good faith runs only between an employee organization and the public employer. A third-party employee organization lacks standing to charge another employee organization with bargaining in bad faith under §173-4.2b(2) of the NYCCBL, contends D.C. 37.

Regarding the UPOA's charge of breach of the duty of fair representation, D.C. 37 submits alternatively that (a) petitioner lacks standing to assert this claim because no incumbent bargaining unit members have been affected adversely

by D.C. 37's actions; (b) D.C. 37 owes UPOA no duty of fair representation; and (c) petitioner has failed to state a claim because it has failed to allege any facts which, if proven, would establish that D.C. 37 acted with hostility or in an arbitrary or discriminatory Manner toward any individual, group, or class of members of the City-wide bargaining unit.

For these reasons, D.C. 37 requests that UPOA's petition be dismissed.

Discussion

This case involves a unique aspect of the NYCCBL, that is, its provision for different levels of bargaining. Section 1173-4.3 of the NYCCBL defines the scope of mandatory collective bargaining as well as the levels at which certain subjects must be bargained. Although a particular subject may be indisputably a mandatory subject of negotiations, under the provisions of §1173-4.3, that subject may be barred from negotiations at the bargaining unit level. The subject as to which D.C. 37's actions are challenged in this proceeding -vacation time - falls in this category.

As both parties recognize, vacation time - a component of time and leave benefits - is subject to the terms of subdivision a(2) of §1173-4.3, which provides that matters which must be uniform for all employees subject to the Career and Salary Plan, including specifically "time and leave rules",

shall be negotiated by the public employer only with the labor entity which is the certified representative of bargaining units which included more than fifty percent of all employees subject to the Career and Salary Plan.[1] Further, there is no question that D.C. 37 is the certified representative of bargaining units which include a majority of subject employees, and thus properly qualifies as the representative for bargaining on City-wide issues. The matter in dispute herein concerns the manner in which D.C. 37 negotiated a change in the City-wide subject of vacation time. The UPOA contends that by bargaining on this issue as part of the economic agreement for D.C. 37's own units, D.C. 37 has bargained in bad faith and has breached its duty of fair representation.

Initially, we must reject the petitioner's claim of bad faith bargaining. Section 1173-4.2b(2) of the NYCCBL makes it an improper practice for a public employee organization to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining. This section recognizes a duty to bargain in good faith which runs between an employee organization and the public employer. It governs the bargaining relationship between those two parties alone. It is not intended to create

[1] The full text of §1173-4.3a(2) appears on pp. 2-3, supra.

any independent rights or causes of action for the benefit of third parties, regardless of whether they are or represent constitutent members of the appropriate bargaining unit. Only the public employer, the City of New York, could challenge D.C. 37's bargaining conduct under this section. It has not done so. The UPOA lacks standing to assert such a claim against D.C. 37. Accordingly, we will dismiss this part of the petition without further discussion.

The UPOA's claim of a breach of the duty of fair representation by D.C. 37 requires us to examine the application of an established doctrine in the context of circumstances not previously considered by this Board. We often have held that a union has an obligation to act fairly, impartially, and non-arbitrarily in negotiating, administering, and enforcing collective bargaining agreements.[2] The present case differs from those considered in the past in that the unit for which D.C. 37 negotiates on City-wide issues - made up of all employees subject to the Career and Salary Plan - includes many employees who, for most other purposes, are represented by unions other than D.C. 37. The question of whether D.C. 37's duty of fair representation on City-wide issues extends to such employees and/or the unions which represent them on

[2] See, e.g., Decision Nos. B-26-84; B-15-83; B-39-82; B-16-79; see Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

other issues, is one of first impression. After careful consideration, we conclude that the City-wide representative's duty of fair representation does extend to all employees in the City-wide unit,[3] but not to other employee organizations.

We have stated that the duty of fair representation is co-extensive with a union's exclusive Authority to deal with the employer on behalf of bargaining unit members with respect to certain matters.[4] Here, pursuant to the provisions of NYCCBL §1173-4.3a(2), D.C. 37 possesses exclusive authority to deal with the employer on behalf of employees subject to the Career and Salary Plan with respect to those matters which must be uniform for all such employees. Therefore, the duty of fair representation attaches for the benefit of all employees in this City-wide unit. However, other labor organizations, such as the UPOA, are not employees subject to the Career and Salary Plan and, thus, are not within the statutory definition of the City-wide unit for which D.C. 37 is the representative. Accordingly, D.C. 37's duty of fair representation extend& to the members of other employee organizations but not to the organizations themselves. That is not to say, however, that such organizations may not seek to provide representation for such members as believe that D.C. 37 has breached its duty toward them.

[3] More accurately, all employees subject to the Career and Salary Plan.

[4] Decision Nos. B-18-86; B-26-84; B-14-83.

Turning to the allegations of the petition herein, if we assume arguendo that the UPOA's claim is presented on behalf of its members and not merely on behalf of the union, nevertheless we find that a cause of action for breach of the duty of fair representation has not been stated. A union breaches its duty of fair representation when its conduct toward a bargaining unit member is arbitrary, discriminatory, or in bad faith.[5] The petition fails to allege any facts which, if proven, would establish that D.C. 37 acted in an arbitrary or discriminatory manner toward employees in the unit represented by the UPOA, or that its actions were motivated by any hostility toward such employees. In this regard, the UPOA's assertion of a breach of the duty of fair representation is entirely conclusory. The only fact alleged is that in past negotiations, City-wide issues were bargained separately from economic issues. While D.C. 37 disputes this allegation, we need not resolve this question. Even if the fact is as alleged by the UPOA, it would not, alone, support an inference of arbitrariness discrimination, or hostility toward UPOA's members. Moreover, D.C. 37 has submitted unrefuted evidence that no incumbent employees are or will be affected adversely by the change in vacation benefits, that all employees will receive an additional holiday, and that the changes negotiated are applicable

[5] Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Jackson v. Regional Transit Service, 54 A.D. 2d 305, 388 N.Y.S. 2d 441 (4th Dept. 1976); Decision Nos. B-16-83; B-12-82.

to all employees covered by City-wide bargaining. Clearly, the UPOA's members have not been singled out or treated differently from all other employees for whom D.C. 37 bargained concerning the change in vacation benefits. Based upon the this record, we find that the UPOA's claim is without merit and must be dismissed.[6]

Finally, we are sure that the petitioner is aware of the exception contained in NYCCBL §1173-4.3a(2) and the avenue of recourse presented therein.

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

[6] We also note that we have previously rejected the suggestion that the alleged change in D.C. 37's bargaining practice vis a vis City-wide issues has any effect on D.C. 37's status and authority as exclusive collective bargaining representative for Career and Salary Plan employees on City-wide issues. We stated that a variation in the structure of negotiations does not remove the UPOA from the binding effect of agreements negotiated by D.C. 37 as City-wide representative. Decision No. B-23-85 at p. 38.

ORDERED, that the petition of the UPOA in this matter be, and the same hereby is, denied.

DATED: New York, N.Y.
May 29, 1986

ARVID ANDERSON
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MEMBER

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