City v. UFA, 37 OCB 43 (BCB 1986) [Decision No. B-43-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In Matter of

THE CITY OF NEW YORK, DECISION NO. B-43-86

Petitioner, DOCKET NO. BCB-884-86

-and- (I-187-86)

UNIFORMED FIREFIGHTERS
ASSOCIATION,

Respondent.

INTERIM DECISION AND ORDER

On July 8, 1986, the City of New York, by its representative, the Office of Municipal. Labor Relations (hereinafter "OMLR" or "the City") filed a Scope of Bargaining Petition pursuant to Section 1173-5.0a(2) of the New York City Collective Bargaining Law (hereinafter "NYCCBL"), in which it alleged that a dispute had arisen between itself and the respondent Union concerning whether certain issues set forth in the petition were matters within the scope of mandatory collective bargaining under Section 1173-4.3 of the NYCCBL. The respondent Uniformed Firefighters Association (hereinafter "UFA" or "the Union") submitted an answer to the petition on July 31, 1986. The City submitted a reply on August 12, 1986, which was superseded by the filing of an amended reply on August 14, 1986, with the consent of the Union.

Background

The UFA is the certified collective bargaining representative for a unit which includes employees in the titles of Firefighter[1] and Fire Marshal.[2] In the course of negotiations for an agreement as to Fire Marshals for a period to succeed the parties' 1982-1984 contract, the City and the Union were unable to resolve their differences, and therefore agreed to submit their dispute to an impasse panel for determination pursuant to the provisions of NYCCBL §1173-7.0c. However, there exists a further disagreement between the parties as to whether certain of the UFA's demands are mandatory subjects of bargaining such as may be submitted to the impasse panel. It is this disagreement which forms the basis of the City's petition herein.

Hearings before the impasse panel designated by the office of Collective Bargaining have been scheduled and are proceeding with respect to all demands which are not challenged in the instant case. Those demands found negotiable in this decision also may be submitted to the impasse panel for resolution. Those demands found to require hearings on practical impact issues

[1] Board of Certification Decision No. 50-82.

[2] Board of Certification Decision Nos. 61-70 and 14-81.

may not be taken before the impasse panel prior to final determination by this Board. While the impasse panel is encouraged to proceed with its hearings on the matters properly before it, the panel may not issue its report and recommendations on any issues the negotiability of which is in dispute until those questions are determined by this Board or by stipulation of the parties.

We will now address each of the UFA demands challenged by the City in its petition. We wish to emphasize that a finding that a matter is bargainable does not constitute an expression of any view on the merits of a demand.[3]

UFA Demand No. 4:

> Provide job description for Fire Marshal (Uniformed).

City's Position

The City relies upon the provision of NYCCBL §1173-4.3b which states:

> "It is the right of the city to, determine the content of job classifications...."

[3] Decision Nos. B-2-73; B-1-74; B-10-75; B-17-75; B-16-81.

The City submits that the Union's demand would convert the content of a position into an item which must be negotiated.. The City argues that this would impinge severely upon the exercise of a management prerogative and would be a result contrary to the provisions of the NYCCBL.

Union's Position

The UFA contends that it does not seek to negotiate over determination of the content of the job classification, but rather seeks only a description of the content already established by the City. The Union submits that a description of the content of a job classification, once that content has been determined by the City, has no bearing whatsoever on the City's right to make that initial determination.

Discussion

It is undisputed that the determination of the content of a job classification is an express management right.[4] The UFA alleges that its demand is not intended to require the negotiation of the content of the job

[4] Decision Nos. B-24-72; B-7-69; B-3-69.

classification for Fire Marshals; it is intended to require the City to submit a description of the content of that position as it has been determined by the City. The Union further alleges that such a description already exists and is supplied by the City to applicants for the position of Fire Marshal. The Union wishes to include the City's description in the collective bargaining agreement. We note that a job description for the position of Firefighter is contained in the current agreement at Article V and Schedule A annexed thereto. The UFA apparently seeks inclusion of a similar job description for Fire Marshals.

As the Union points out, PERB has held that:

> "job content of current employees is a mandatory subject of negotiations so long as the negotiations demand would not narrow the inherent nature of the employment involved."[5]

However, the case before PERB did not involve a statutory management rights provision such as relied upon by the City in the present case. The existence of the management rights provisions of NYCCBL §1173-4.3b is a distinguishing factor which renders the PERB ruling not dispositive of a case arising under the NYCCBL.

[5] Scarsdale Police Benevolent Ass'n v. Village of Scarsdale, 8 PERB §3075 (1975).

We find that the UFA's request for inclusion of a job description does not constitute, per se, an impairment of the City's right to determine the content of job classifications. However, it must be understood that in light of the City's statutory prerogative, the City may not be required to include such a job description in the agreement in any way which would limit the City's right unilaterally to change the content of the Fire Marshal classification at any time, or otherwise limit the exercise of management's rights under NYCCBL §1173-4.3b, unless the parties voluntarily agree otherwise.[5A] Nevertheless, the inclusion of such a job description may be seen as of some value, since it would put employees on notice of what is expected of them by management. Such a notice would constitute a condition of employment. Accordingly, we hold that this demand is mandatorily negotiable, subject to the condition stated above.

Union Demand No. 6:

6(ii): Vehicles shall be full size cars capable of four wheel drive, with police package features such as special locks, separation of driver and back seat, etc.

[5A] The existence of this managerial prerogative would not preclude, of course, bargaining to alleviate any practical impact which might result from a substantial change in the Job classification.

6(iii): Radios, as primary source of

communication shall be up-graded to the same quality as used by the Fire Department.

6(iv): All squads shall be manned by seven (7) Fire Marshals per Tour.

City's Position

The City asserts that the selection and issuance of equipment is a management prerogative and thus is not a mandatory subject of bargaining. Moreover, the City submits that a demand which goes beyond a general safety concern and would give a union veto power over equipment selected by the employer, is a non-mandatory subject of bargaining.

With respect to demand 6(iv), the City contends that this Board has held that levels of manning are specifically within the area of management prerogative described in NYCCBL §1173-4.3b. The City submits that this demand to establish a quota for Fire Marshals per squad therefore is a non-mandatory subject of bargaining.

Union's Position

The UFA alleges that its demands regarding vehicles (6(ii)) and radios (6(iii)) involve a practical impact on the safety of Fire Marshals. The Union provides

details concerning the currently-used vehicles' lack of power, handling inadequacies, and the repeated failure of door locks. Further details are alleged concerning the high failure rate of the "Star Wars" portable radios currently used by Fire Marshals. The union alleges several specific incidents in which failures of vehicles and/or radios endangered the safety of Fire Marshals. The Union submits that its demands 6(ii) and 6(iii) relate to the "obvious" practical impact that failures of existing equipment have on Fire Marshals' safety.

Additionally, as to demand 6(iv), the UFA contends that the City's decisions on manning have had a practical impact on both the workload and safety of unit members. The Union alleges that undermanning on certain shifts creates a backlog of work for which Fire Marshals on subsequent shifts are responsible. It is asserted that the repeated drop in manning levels causes a backup of investigation assignments and a greatly increased workload over extended periods of time. The UFA also argues that drops in manning levels deprives Fire Marshals in the field of backup from fellow Fire Marshals upon whom they depend for assistance in situations where their physical safety is at risk. Thus, the Union asserts, the practical impact of the City's manning policy on the safety of Fire Marshals is manifest.

Discussion

We agree with the City that demands which purport to dictate the equipment which the City must use or the levels of manning which the City must provide are infringements of City's statutory management prerogatives under NYCCBL §1173-4.3b and constitute non-mandatory subjects of bargaining.[6] However, to the extent that the Union establishes that management decisions on equipment and manning have a practical impact on the safety and/or workload of unit employees, the Union possesses a right to seek the alleviation of such practical impact. The determination by this Board of the existence of a practical impact is a condition precedent to determining whether there are any bargainable issues arising from management's actions.[7] The question of whether a management action has had a practical impact on employees is a question of fact which may require the holding of a hearing.[8] We are satisfied that the Union's pleadings in this case raise substantial issues of whether there has been a practical impact on the safety and workload of Fire Marshals so as to warrant the holding of a hearing on

[6] See Decision Nos. D-3-73, B-16-75(equipment); B-13-71, B-5-13, B-24-75 (manning)

[7] Decision Nos. B-9-68; B-1-74; B-16-74; B-2-76; B-36-86.

[8] See, Decision Nos. B-16-74; B-36-86.

these questions. Accordingly, we hold that UFA demands 6(ii), 6(iii), and 6(iv) are not mandatory subjects of bargaining, but we shall direct that a hearing be held on the Union's allegations of practical impact before a Trial Examiner designated by the office of Collective Bargaining.

UFA Demand No. 8:

> Each Fire Marshal unit shall have their own quarters including individual locker facilities for clean ing and facilities for storage of equipment.

City's Position

The City observes that NYCCBL §1173-4.3b provides the City with the right, "to ... maintain the efficiency of governmental operations...." The City submits that the Union's demand for quarters and locker facilities would infringe upon the City's right to allocate its physical plant in accordance with its obligation to deliver municipal services. The City asserts that the allocation of the City's facilities is a management prerogative and not a mandatory subject of bargaining.

Union's Position

The Union explains that in the course of their work investigating arson scenes, Fire Marshals often get very wet and dirty and require facilities to shower or wash up and to store clean clothing and equipment. The Union claims that the provision to Fire Marshals of adequate quarters for cleaning and for storage of clothing and equipment has been a regular and traditional practice of the Fire Department. However, the Union alleges that Fire Marshals assigned to Task Force 2, unlike those assigned to every other Task Force or Base, operate out of a mobile trailer and have no such facilities. It is for the benefit of these Fire Marshals that the UFA seeks to embody this alleged regular and traditional Department practice in the collective bargaining agreement.

Discussion

While we agree that the City's management prerogatives give it broad discretion in allocating the use of its physical plant, we believe that its discretion in this area is not absolute. The City has a statutory obligation to negotiate concerning its employees' working conditions.[9]

[9] NYCCBL §1173-4.3a provides that a public employer has a duty "... to bargain in good faith on ... working conditions...."

In view of a job which requires employees to get very wet and dirty, it hardly seems open to question that the furnishing of facilities for clean-up and for the storage of clean clothing involves a working condition within the meaning of the statute. moreover, we have recognized that the question of whether a particular benefit is a condition of employment is to be determined on the basis of the circumstances of a particular case, and that a regular and traditional practice with respect to a benefit may be persuasive evidence in determining this question.[10] In the present matter, we are convinced that the circumstances of the Fire Marshals' work, taken together with the fact that all Fire Marshals other
than those assigned to Task Force 2 already receive the requested benefit, establish that this demand relates to a working condition and thus constitutes a mandatory subject of bargaining.[11]

[10] Decision No. B-2-73.

[11] We al so find that in the face of the union's specific allegations concerning the basis for this demand, the general denial contained in the City's reply is insufficient to rebut the Union's assertions or to raise a triable question of fact.

UFA Demands Relating To Training

10(ii): Contractually provide that all Fire Marshals required training shall be upgraded.

11(i): Contractually provide that the City shall provide training in pursuit and defensive driving for all Fire Marshals.

11(ii): Provide that all Fire Marshals prior to being assigned, shall receive the same training as New York City Police officers in the areas of patrol and the use of-all weapons.

11(iii): The City shall provide an outdoor shooting range.

14(ii): Provide that the City should bear the cost of ammunition for monthly practice range shooting.

City's Position

The City submits that it is within its management prerogative to determine the quantity and quality of training for its work force. The issue of training is a non-mandatory subject of bargaining. The City also contends that with respect to demand 14(ii), the question of compensation for training is not a mandatory subject of bargaining unless the particular training is required for continued employment or for improvement in pay, which, the City asserts, it is not in the present

case. Finally, the City argues that with respect to the Union's allegations of practical impact, the Union has failed-to allege any specific facts which support the existence of a practical impact in this area.

Union's Position

First, concerning demands 10(ii), 11(i), 11(iii) and 14(ii), the Union notes that all full duty Fire Marshals are required to carry firearms. Further, the UFA alleges that the Fire Department requires all Fire Marshals to undergo yearly firearms testing and certification. This certification is a prerequisite to continued employment as a full duty Fire Marshal. The Union contends that regular practice shooting is essential to maintain the minimum level of proficiency required to obtain yearly certification. Thus, argues the Union, training is a necessary prerequisite to qualification for continued employment as a full duty Fire Marshal, and, therefore, is a mandatory subject of bargaining. The UFA also contends that because Fire Marshals may encounter armed or violent individuals during the course of their investigations, the maintenance of skill in the use of a weapon is "plainly necessary" to avoid injury or death when confronting such individuals. The Union submits that

this demand involves a safety impact.

Discussion

The NYCCBL provides that it is the right of the City:

> "to determine the standards of services to be offered by its agencies; ... maintain the efficiency of governmental operations; ... and exercise complete control and discretion over its organization and the technology of performing its work."[12]

We have held that, consistent with the statutory grant of management prerogative, the establishment of training procedures, in most circumstances, is a matter of management right and not a mandatory subject of bargaining.[13] An exception to this general principle may be established where training is required by the employer as a qualification for continued employment or for improvement in pay or work assignments.[14] A further exception may be found where it is demonstrated that there exists a practice and tradition of the employer encouraging and supporting employee participation in such training

[12] NYCCBL §1173-4.3b.

[13] Decision Nos. B-4-71; B-7-72; B-16-74; B-23-75; B-7-77; B-16-81.

[14] Decision Nos. B-8-68; B-2-73.

or education.[15]

We find that none of these exceptions are applicable to the UFA's demands in this case. With respect to firearms training and practice, the union's most persuasive argument is that each Fire Marshal is tested annually and must be certified as passing in order to continue serving as a "full duty Fire Marshal". There is no allegation that the employment of those who do not pass is terminated or that they received a cut in pay. Moreover, while the City requires testing, it also provides an opportunity for Fire Marshals to receive firearms training three times a year at Camp Smith near Peekskill, New York. The Union contends that the training provided by the City is inconvenient to get to and inadequate to maintain the required proficiency. We find that questions concerning the level of training provided by the City are matters within the City's management prerogatives and are not mandatory subjects of bargaining.[16]

[15] Decision No. B-2-73 (registered nurses); Board of Education of Huntington v. Associated Teachers of Huntington, 30 N.Y. 2d 122, 127-128, 331 N.Y.S. 2d 17, 21-22 (1972)(teachers).

[16] See, Decision No. B-16-81.

In addition to its contention that these subjects of training are mandatory subjects of bargaining, a contention we have rejected, the Union asserts that these subjects involve a practical impact on the safety of Fire Marshals. The City argues that the Union has failed to allege facts to establish any practical impact resulting from a management action. In effect, the City asks, "Where is the management action which gave rise to the purported safety impact?" We do not believe that the UFA has answered that question satisfactorily.

The Union's safety impact claim is based upon its assertion that Fire Marshals' encounters with armed and violent individuals and the necessity of their driving at high speed through traffic creates a threat to their safety which might be ameliorated by firearms and driving training. While this may be true, it does not present a case of practical impact within the meaning of the NYCCBL. The concept of practical impact is included in NYCCBL §1173-4.3b as a means of alleviating the adverse impact upon employees of a decision made by the employer in the exercise of its statutory management prerogatives. It is not enough to allege a threat to employee safety; in order to avail itself of the practical impact procedures of the law, it is incumbent upon the Union to demonstrate

that the alleged safety impact results from a management decision or action, or inaction in the face of changed circumstances. No such management decision or action is alleged by the UFA herein, nor are changed circumstances alleged. As stated by the City, the only management action has been the City's refusal to accede to the Union's training demands. We hold that this does not state a claim of practical impact.

UFA Demand No. 12:

> Provide for one (1) UFA delegate for every twenty-five (25) Fire Marshals in a unit.

City's Position

The City contends that this demand is so vaguely worded as to make it uncertain whether the matter requested is a mandatory subject of bargaining. Accordingly, the City submits that the demand should be deemed a non-mandatory subject of bargaining.

Union's Position

The Union asserts that this demand is clear on its face. The current-collective bargaining agreement provides for one UFA delegate for every Firefighter

unit with 10 or more Firefighters. The demand seeks to provide for one delegate for every 25 Fire Marshals in a Fire Marshal unit. The Union alleges that the City's claim of vagueness is "inexplicable".

Discussion

We find that the Union's demand, when read in the context of the existing contract provision concerning numbers and privileges of delegates (Article XXII), is clear. In the absence of any further allegation of a basis for objection by the City, and since this demand relates to a union's legitimate desire to have representatives available to devote time to fulfilling the union's duty to represent unit members, we find this demand to be mandatory subject of bargaining.[17] We note that while the selection of delegates, and the number thereof, are internal union matters, to the extent that the Union seeks assignments, privileges, or release time for such delegates, these become subjects of negotiations between the Union and the employer.

[17] See, Decision Nos. B-3-75; B-22-75; B-16-81; cf.,B-16-82.

UFA Demand No. 13:

> Clarify existing clause [portal to portal pay] applies to Fire marshals.

City's Position

The City states that it is left unable to respond to this demand. The City characterizes the demand as "vague and ambiguous as to what it seeks to address." On this basis, the City asks that this be deemed a nonmandatory subject of bargaining.

Union's Position

The Union contends that the City knows that this demand involves portal to portal pay. The UFA explains that prior to the instant proceedings, a dispute arose between the Fire Department and the Union concerning the application of the portal to portal pay provisions of the collective bargaining agreement (Article XXV). The parties' Impartial Chairman ruled that the provision did not apply to Fire Marshals.[18] The Union's demand herein seeks to clarify the existing clause to make it clear that it is applicable to Fire Marshals.

Discussion

The Union's demand is, indeed, unclear on its face. However, the full statement of UFA demands (City Exhibit

[18] Arbitration No. A-1932-84.

"1") includes a cross-reference which links this demand to the portal to portal pay provisions of the current contract (Article XXV). This cross-reference, together with the history of the parties' prior litigation of the applicability of this provision to Fire Marshals, must be deemed to have put the City on notice that this demand was intended by the UFA as a means of overruling the Impartial Chairman's decision and making clear the applicability of the portal to portal pay provisions to Fire Marshals. We find that in its proper context, which the City was aware of, this demand is not so vague as to require its exclusion from the scope of bargaining. Since the portal to portal pay issue is a matter of compensation, we find this demand to be a mandatory subject of bargaining.

UFA Demand No. 15:

> Provide for the establishment of limited service lines, clerical and related functions to be manned by limited service Fire Marshals.

City's Position

The City observes that pursuant to NYCCBL §1173-4.3b,

> "It is the right of the City ... to determine the content of job classifications...."

The City argues that the Union's demand would interfere with the City's managerial prerogative to determine the job content of each classification. Therefore, the City submits, the demand is not a mandatory subject of bargaining.

Union's Position

The UFA alleges that the provision of limited service lines is a subject over which the City already has bargained with the Union. The Union analogizes its demand to a demand by college instructors for a support staff, a matter which was found to be a mandatory subject of negotiations by PERB.

Discussion

It is clearly the right of the City, pursuant to NYCCBL §1173-4.3b, to determine the content of job classifications and to determine which employees shall be

assigned to perform particular jobs. The fact that the City may have bargained voluntarily in the past concerning a limitation on its management prerogative does not transform such limitations into mandatory subjects of bargaining in subsequent negotiations.[19]

The Union's reliance on the PERB decision[20] involving college instructors is misplaced. That decision was based upon a prior finding by PERB that secretarial services for a college faculty was a term or condition of the faculty's employment. No evidence has been presented herein that the furnishing of support services is a term or condition of Fire Marshals' employment.[21] No basis has been offered to show how Fire Marshals should be equated to college instructors in this regard.

We hold that this demand constitutes an impairment of the City's prerogative to assign its employees and to determine the content of job classifications. Accordingly, this demand is not a mandatory subject of bargaining.

---

[19] Decision Nos. B-11-68; B-7-69; B-4-71; B-7-72; B-4-74; B-6-74; B-16-74.

[20] Fulmont Association of College Educators, 15 PERB §4654 (1982)

[21] Onondaga Community College, 11 PERB #3045 (1978).

UFA Demand No. 18

> Provide that Fire Marshals shall not be restricted in outside employment except as provided by law.

City's Position

The City relies upon its statutory management right under NYCCBL §1173-4.3b, to:

> "... direct its employees; ... maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted...."

The City contends that this demand would,

> "... deny the City its right to efficiently assign its personnel, especially those in such an essential service as the Fire Department."

For this reason, the City submits that this demand is not a mandatory subject of bargaining.

Union's Position

The UFA alleges that this Board already has held that outside employment is a mandatory subject of bargaining. Moreover, the Union submits that what Fire Marshals do when they are off-duty "plainly has no bear

ing at all" on the City's right to efficiently assign its personnel while they are on-duty. Therefore, the Union asserts that this demand is a mandatory subject of bargaining.

Discussion

Both this Board and PERB have held that a demand concerning allowance of outside employment or "moonlighting" is a mandatory subject of bargaining.[22] While it has been recognized that a public employer may seek to impose some limitations upon its employees at times when the employees normally would be off-duty, the imposition of such limitations detracts from employees' opportunities to enjoy and use their "time off" in a manner of their own choosing.[23] The City's right efficiently to assign its personnel, at such times as they are on-duty, cannot be construed so as to preclude the Union from negotiating over unit members' right to use their time when they are off-duty. And, while no public policy or statutory limitation on outside employment is alleged by the City, we note that the

[22] Decision No. B-4-75; Local 589, International Association of Fire Fighters v. City of Newburgh, 16 PERB §3030 (1983).

[23] City of Newburgh, supra, 16 PERB at 3048.

demand only seeks to authorize outside employment "except as provided by law." This proviso should protect the City's interest in the event that there exists any legal limitation as to which we have not been informed. For these reasons, we hold that this demand is a mandatory subject of bargaining.

DETERMINATION

NOW, THEREFORE, pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, and for the reasons set forth in the foregoing decision, it is hereby

DETERMINED, that the following UFA demands are within the scope of mandatory-collective bargaining between the parties herein: 3, 4, 8, 12, 13, and 18; and it is further

DETERMINED, that the following UFA demands are not within the scope of mandatory collective bargaining between the parties herein: 6(ii), 6(iii), 6(iv), 10(ii), 11(i), 11(ii), 11(iii), 14(ii), and 15; and it is further

ORDERED, THAT A HEARING BE HELD BEFORE A TRIAL EXAMINER DESIGNATED BY THE OFFICE OF COLLECTIVE BARGAINING ON THE UNION'S ALLEGATIONS OF PRACTICAL IMPACT ON SAFETY AND WORKLOAD WITH RESPECT TO THE CITY'S DECISIONS CONCERNING MOTOR VEHICLES, RADIOS, AND LEVELS OF MANNING.

DATED: New York, N.Y.
September 25, 1986

ARVID ANDERSON
CHAIRMAN

Daniel q. collins
Member

Milton friedman
Member

John d. feerick
Member

Dean l. silverberg
Member

Edward f. gray
Member

Carolyn gentile
Member