UPOA v. DOP, 37 OCB 44 (BCB 1986) [Decision No. B-44-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

THE UNITED PROBATION OFFICERS ASSOCIATION, DECISION NO. B-44-86

Petitioner, DOCKET NO. BCB-867-86

-and-

THE DEPARTMENT OF PROBATION,

Respondent.
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DETERMINATION AND ORDER

On April 15, 1986, the United Probation Officers Association ("UPOA" or "petitioner") filed an improper practice petition alleging that the New York City Department of Probation ("the Department") refused to bargain in good faith concerning criteria and procedures for the implementation of a new merit increase program. On April 28, 1986, the City of New York ("City"), by its Office of Municipal Labor Relations ("OMLR"), filed an answer to the petition. Petitioner filed a reply on May 6, 1986 and the City filed a sur-reply on May 19, 1986.

Background

According to UPOA, at a labor-management meeting or meetings in March and/or April 1986, the City's representatives advised representatives of petitioner that a

merit pay plan would be implemented in the Department. Thereafter, petitioner allegedly sought to negotiate with respondent concerning criteria and procedures relating to the implementation of merit increases but respondent allegedly refused to negotiate. Thereafter, petitioner filed the instant petition.

Positions of the Parties

Petitioner's Position

The UPOA contends that the implementation of a merit increase policy without bargaining with the union constitutes a unilateral change in the working conditions of bargaining unit members, in violation of section 1173-4.2(a)1 and (4) of the New York City Collective Bargaining Law ("NYCCBL").[1] Petitioner argues that

[1] Section 1173-4.2a of the NYCCBL provides in relevant part:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
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> (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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> * * *
>
> (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.

the criteria and procedures to be applied in awarding merit increases are mandatory subjects of bargaining and, contrary to the City's position, are negotiable at the unit level of bargaining.

As a remedy for the alleged statutory violations, UPOA requests that the Board (1) direct the City to refrain from awarding merit increases in the Department until mutually agreed upon criteria and procedures are established, and (2) order the City to bargain in good faith.

City's Position

The City contends that the petition should be dismissed because it fails to state a prima facie claim of improper practice. Specifically, OMLR asserts that the petition is defective in that it:

1) fails to identify any applicable statutory provisions claimed to have been violated;

2) fails to state any facts that would constitute an improper practice;

3) fails to provide material dates on which the alleged violations occurred and, as a result, fails to establish that the petition was filed within the four-month period prescribed by

section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules");[2]

4) fails to assert that a demand to negotiate concerning the subject of the petition was made so that respondent can be charged With a refusal to bargain in violation of the NYCCBL.

OMLR contends further that petitioner failed to deny the affirmative defenses paraphrased at paragraphs 2 and 4 above. Therefore, it is argued, the allegations contained therein must be deemed admitted, in accordance with section 7.9 of the Rules.[3]

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[2] Section 7.4 of the OCB Rules provides in relevant part:
§7.4 Improper Practices. A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order....

[3] Section 7.9 of the OCB Rules provides in relevant part:
§7.9 Reply - Contents; Service and Filing. Within ten (10) days after service of respondent's answer, petitioner may serve and file a verified reply which shall contain admissions and denials of any additional facts or new matter alleged in the answer.

(more)

(3 continued)
Additional facts or new matter alleged

Addressing the substantive issues raised by the petition, the City submits that it had, and has, no obligation to negotiate with UPOA. First, respondent contends, even if the subject of merit increases is a mandatory one, it is a subject for citywide bargaining as defined by section 1173-4.3a(2)of the statute.[4]

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in the answer shall be deemed admitted unless denied in the reply. Where special circumstances exist that warrant an expedited determination, the Director, in his discretion, may order petitioner to serve and file its reply within less than ten (10) days. A copy of said reply shall be served on each respondent, and the original and three (3) copies thereof, with proof of service, shall be filed with the Board (emphasis added).

[4] NYCCBL Section 1173-4.3a(2) provides in relevant part:

§1173-4.3 Scope of collective bargaining; management rights.

a. Subject to the provisions of subdivision b of this section and subdivision c of Section 1173-4.0 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of sums

(more)

([4] continued)

equal to the periodic dues uniformly required of its members by such certified or designated employee organization and for

UPOA, the City notes, is not the bargaining agent for citywide negotiations. In addition, OMLR asserts, the subject of merit increases is governed on a citywide basis by Administrative-Order No.39, concerning "Policy Guidelines for Promotions and Salary Adjustments," which

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> the payment of the sums so deducted to the certified or designated employee organization, subject to applicable state law, except that:
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> * * *
>
> (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; ....

issued on September 27, 1977.[5] As this policy has been in effect

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[5] Administrative order No. 39 provides, in relevant part:

I. GENERAL

The guidelines presented herein are for use within the broad constraints and limits set forth in Executive Order No. 90, which are:

A. Promotions, appointments, and salary adjustments must be within and consistent with, the agency's obligation plans.

B. Appointments and other personnel actions must be consistent with the agency's approved personnel ceilings.

C. All actions must be consistent with, and within, net appropriations.

D. All actions must be in accord with Civil Service Law, rules, regulations and interpretations.

* * *

III. SALARY ADJUSTMENTS

* * *

C. No more than one adjustment or provisional promotion can be provided for any employee within a 12 month period from the date of the last adjustment or provisional promotion pursuant to these provisions.

1. Sub-managerial adjustments must be based on merit. All appropriate documentation should be maintained for post-audit. Such adjustments cannot exceed 7% of the individual's current salary, and in no case may exceed $1,200.

(more)

for approximately nine years, respondent maintains that the present attempt to negotiate concerning matters dealt with therein is untimely under OCB Rule 7.4.

Finally, the City-asserts that it has no duty to negotiate in this case because UPOA failed to make a demand either in or out of the bargaining context. As an agreement between the parties was recently concluded, respondent argues that, under section 1173-7.0a(3), petitioner is estopped from making further demands.

For all of the foregoing reasons, the City maintains that the petition should be dismissed in its entirety.

Discussion

We consider at the outset respondent's arguments relating to the legal sufficiency of the UPOA's petition. The City contends, inter alia, that the petition is defective in that it fails to cite the statutory pro-

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([5] continued)

2. Managerial adjustments must be limited to persons having above average performance ratings and all appropriate documentation for such ratings must be maintained for post-audit. In no case shall the adjustment exceed 7% of current salary.

* * *

vision(s) claimed to have been violated, fails to state any facts that would constitute an improper practice, and fails to provide the dates on which the alleged violations occurred, so as to establish that the petition was timely filed within four-month period prescribed by section 7.4 of the OCB Rules.

The pleading requirements applicable to proceedings before the office of Collective Bargaining are set forth in the OCB Rules. Thus, section 7.5 provides that an improper practice petition must be verified and contain:

> a. The name and address of the petitioner;
> b. The name and address of the other party (respondent);
> c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth;
> d. Such additional matters as may be relevant and material.

We have previously observed that this section states a rule of notice pleading, requiring that a petitioner provide information sufficient to place the respondent on notice of the nature of the claim and to enable him to formulate a response thereto.[6] In addition, it

[6] Decision No. B-23-82.

is our long-established policy that the OCB Rules shall be liberally construed.[7] Accordingly, substantial rather than technical compliance with the Rules has been deemed sufficient, particularly where the other party is not prejudiced by a defect in pleading.

The UPOA's petition in the instant matter satisfies the above-described standards. While the petition does not cite the sections of the NYCCBL alleged to be violated, we find that the language used by petitioner, viz., "unilateral changes in ... working conditions ... without bargaining with the UPOA" and "refused to bargain in good faith", afforded respondent ample notice of the nature of petitioner's claim. Further, the failure to provide the appropriate statutory references in the petition is cured by the reply in which petitioner asserts that the Department's actions constitute violations of sections 1173-4.2a(l) and (4) of the NYCCBL.

With respect to the City's allegation that the petition is defective because it fails to state facts that would constitute an improper practice, we again rule in favor of the union. The petition complains of the implementation of a merit increase policy without bargaining regarding criteria and procedures. Implicit

[7] Decision Nos. B-8-77; B-9-76; B-5-74. See, OCB Rules §15.1.

in such allegation is a claim that criteria and procedures for granting merit increases are matters for collective bargaining and that the Department's unilateral action thereon constitutes a refusal to bargain within the meaning of the NYCCBL. We find that the allegations of the petition sufficiently cover the material substantive elements of a claim of improper practice to state a prima facie case.[8]

With respect to respondent's contention that the petition is fatally defective because it fails to provide facts which would establish that it was timely filed under OCB Rule 7.4, it suffices to say that Rule 7.4 is a statute of limitations for improper practice proceedings under the NYCCBL. As such, it is an affirmative defense which must be pleaded and proved by the respondent.

[8] The U.S. Supreme Court, in NLRB v. Katz, 369 U.S.736, 50 LRRM 2177(1962), holding' that an employer's unilateral change in conditions of employment violated section 8 (a)(5) of the National Labor Relations Act (the private sector analogue of NYCCBL section 1173-4.2a(4), noted that unilateral action by the employer "frustrates the objectives of §8(a) (5) much as does a flat refusal." BERB has taken the same position and held that a unilateral change in a term or condition of employment constitutes a refusal to bar gain See, Buffalo Bldg. Trades Council v. Board of Educ. 6 PERB 13051 (1973); East Meadow Teachers Ass' n v. Board of Educ., 4 PERB §3018 (1971). This Board also has so held. Decision No. B-25-85; See, Decision Nos. B-6-82; B-5-80; B-5-75.

There is no requirement that the petitioner establish, in the first instance, that its claim is timely.

Next we address respondent's argument, founded on OCB Rule 7.9, that two of its affirmative defenses should be deemed admitted and the petition dismissed on this basis. Rule 7.9 provides that the petitioner may submit a verified reply "which shall contain admissions and denials of any additional facts or new matter alleged in the answer." Rule 7.9 also states that:

> [a]dditional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply.

Here, petitioner did not respond specifically to the Second and Fourth Affirmative Statements contained in the City's answer. However, its reply clearly denies the substance of those statements and affirmatively recites the facts on which its claim of improper practice is based, including that its representatives sought to negotiate with respondent concerning criteria and procedures prior to the implementation of a newly announced merit pay plan and that respondent refused to negotiate. Accordingly, we conclude, respondent's Rule 7.9 defense is entirely without merit.

Turning now to the substantive issues raised by the petition, we begin with the principle, well-established in the private sector, that merit increases are a subject of mandatory collective bargaining.[9] The State PERB also has ruled that merit increases are a mandatory subject.[10] In Decision No. B-9-69, we first considered this issue and found that, because of the City's unique budgetary processes, which present problems not usually encountered in the private sector,[11] a standard should be adopted which would take into account the distinguishing features of public employment. Therefore, we concluded,

> 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

[9] NLRB v. Katz, supra.

[10] Local 589, Int'l Ass'n of Fire Fighters v. City to Newburgh, 16 PERB §3030 (1983); Ulster County Unit, Local 856, CSEA v. County of Ulster, 14 PERB 13008 (1981); Faculty Ass'n of Jefferson Community College v. Jefferson County Bd. of Supervisors, 6 PERB §3031 (1973).

[11] We noted, inter alia, that the funds for merit increases are limited to unexpended funds already in an agency's budget and that the Bureau of the Budget (now the Office of Management and Budget), acting for the Mayor, may veto the granting of merit increases in an agency where inequities may result in that another agency has no available unused funds. Decision No. B-9-69 at 6-7.

> 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... (emphasis added).

Subsequent to our decision in B-9-69, we have had several occasions to consider the subject of merit increases and have adhered to our view that the decision to grant merit increases and the amounts thereof are prerogatives of management, while the guidelines to be applied in determining eligibility for a merit increase are mandatory subjects of bargaining.[12]

In the case at bar, neither party has suggested that we should depart from our precedents concerning merit raises. However, the City has interposed several affirmative defenses which, it claims, exempt it from bargaining in this case. First, we shall address respondent's argument that the criteria and procedures for granting merit increases are matters appropriate for citywide bargaining.

Section 1173-4.3a of the NYCCBL is a unique provision, as it prescribes not only the scope of mandatory bargaining under the statute, but also the appropriate level

[12] See, Decision No. B-3-83.

of bargaining for certain matters. Under this statutory scheme, a matter that is a mandatory bargaining subject may nonetheless be barred from negotiations if proposed at the unit level of bargaining. Section 1173-4.3a(2) specifies only two of the subjects which must be negotiated on a citywide basis: overtime and time and leave rules. Other citywide subjects have been determined on a case-by-case basis and generally include matters which, for reasons of administrative or budgetary consistency, should not be left to the discretion of the individual agency or department.[13] Unlike annual salary increments, which are paid to all bargaining unit members in good standing, merit increases are neither universally nor automatically provided. Rather, they are informed by a large measure of discretion, not only with respect

[13] While demands relating to sick leave (Decision Nos. B-3-75, B-23-85), holidays (Decision Nos. B-11-68, B-4-69, B-1-70, B-23-85), vacations (Decision Nos. B-11-68, B-16-81, B-23-85), and pay practices (Decision Nos. B-11-68, B-23-85) have been held to be negotiable at the citywide level of bargaining, demands relating to excusal for lateness (Decision No. B-11-68), union participation in employee orientation sessions (Decision No. B-11-68), tuition reimbursement (Decision No. B-2-73) and release time for union activity (Decision Nos. B-16-82, B-23-85) have been held to be appropriate subjects for unit bargaining.

to number and amount, but also with respect to standards and criteria. Clearly, factors relevant to the determination of merit increases are likely to reflect, inter alia, the unique attributes of the particular trade, occupation or profession of the bargaining unit involved. Accordingly, we find that criteria and procedures for the granting of merit increases, unlike annual salary increments, are appropriate subjects for negotiation at the level of the bargaining unit.

Nor has the City offered any evidence or argument that Administrative order No. 39 is controlling in this area. We note that Administrative Order No. 39 only provides guidelines relating to the decision to grant merit increases and the amounts thereof, subjects which, given the peculiar circumstances of the City's budgetary processes, we have demand to be management-prerogatives. Thus, the Order provides that only one salary adjustment may be granted an employee within a twelve-month period and, for sub-managerial employees, that such increases may not exceed 7% of the employee's current salary or $1200, whichever is less. Nothing in the order forecloses, nor could such unilateral directive properly foreclose, the negotiation of additional job-related criteria or of procedures for the implementation of merit increases,

once a decision to grant increases has been reached. Thus, for the aforementioned reasons, we cannot find that the Order acts as a bar to the UPOA's claim herein.

Moreover, although it cannot be determined from the record precisely when the Department of Probation announced its intention to implement a merit pay plan, it appears that there has been no regular or systematic program of merit increases until the present.[14] Therefore, we shall reject the City's argument that the UPOA's petition seeking to negotiate concerning criteria and procedures for the granting of merit increases, filed in April 1986, is untimely because it follows issuance of the Administrative Order by some nine years. It is well-settled that a union appropriately interposes itself only where an action of management has immediate impact on the employees represented by the union or necessarily entails such impact in the immediate or

foreseeable future. Until the announcement of a departmental

[14] We take administrative notice that an undated circular, issued by Department Commissioner Thomas L. Jacobs and addressed to "all staff" (copies of which were made available to OCB and to the Director of OMLR by a representative of petitioner while this matter was pending before the Board) lists the names of employees selected to receive salary adjustments. The circular states that this is the Department's "first merit increase program" and that the adjustments prescribed therein are effective on June 1, 1986.

merit increase program and its imminent implementation, UPOA had no actual or constructive knowledge of definitive acts which put it on notice of the need to complain. Accordingly, we conclude that the instant petition was not untimely filed.[15]

Finally, we address the City's argument that UPOA's failure to demand negotiations on the subject of criteria and procedures for the granting of merit increases requires dismissal of the petition. We note that the 1984-87 collective bargaining agreement between the parties was concluded well in advance of the Department's decision to implement a merit increase program. The impasse panel designated to resolve certain outstanding issues in the negotiations issued its Report and Recommendations in November 1985,[16] some four months before the union claims to have received notice of the plan and seven months before the plan was effectively implemented. Under these circumstances, we cannot find that the union waived its right to negotiate by failing to make a specific

[15] See, Council Of Supervisors and Administrators, Local I v. Board of Educ., 19 PERB §3015 (1986); Local 891, IUOE v. Board of Educ., 12 PERB §3070 (1979); Civil Service Employees AssIn v. County of Monroe, 10 PERB §3108 (1977).

[16] Matter of City of New York and United Probation Officers Ass'n, Docket No. 1-175-84 (Arb.: J. Crowley, Nov. 1985).

demand during the last round of contract negotiations. Further, where an employer takes unilateral action on a mandatory subject of bargaining not covered by an existing agreement and not raised as an issue in the negotiations out of which such agreement arose, the union is not required to make a formal demand to bargain on such subject. An employer's unilateral change in a term or condition of employment violates the NYCCBL as much as does a flat refusal to bargain.[17]

For the foregoing reasons, we find the City's uni lateral implementation of a merit increase program in the Department of Probation without negotiating with UPOA concerning criteria and procedures for granting such increases constitutes an improper practice within the meaning of section 1173-4.2a(4) of the NYCCBL. We further find that, as a consequence of the refusal to confer with the certified employee representative concerning terms and conditions of employment, there necessarily is interference with the effective representation of such employees and with the exercise by employees of their protected rights. Accordingly, we

[17] See, NLRB v. Katz, supra note 8. Also, Decision No. B-25-85.

also find that the City has violated section 1173-4.2a(i)of the statute.[18]

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

DETERMINED, that the unilateral implementation of a merit increase program without negotiating concerning criteria and procedures with the certified representative of affected employees constitutes an improper public employer practice, in violation of sections 11734.2a(l) and (4) of the NYCCBL; and it is therefore

ORDERED, that the improper practice petition filed herein be, and the same hereby is, granted; and it is further

DIRECTED, that respondent shall cease and desist from unilaterally implementing merit increases for employees in petitioner's bargaining unit without negotiating concerning criteria and procedures therefor; and it is further

[18] Decision No. B-25-85. See, Buffalo Bldg. Trades Council v. Bd. of Educ., supra note 8.

DIRECTED, that respondent shall bargain in good faith with petitioner concerning criteria and procedures for the implementation of merit increases in the Department of Probation.

DATED: New York, N.Y.
October 17, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

JOHN D. FEERICK
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER