L.1180, CWA v. NYPD, et. al, 39 OCB 30 (BCB 1987) [Decision No. B-30-87 (IP)]

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

-between-

COMMUNICATIONS WORKERS OF AMERICA,
on behalf of its Local 1180,

DECISION NO. B-30-87

Petitioner,

DOCKET NO. BCB-828-85

-and-

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

Respondents.
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DETERMINATION AND ORDER

This proceeding commenced on November 15, 1985, when the Communications Workers of America ("CWA" or "petitioner") filed a verified improper practice petition alleging as follows:

> On January 22, 1985 the Communications Workers of America and its Local 1180 participated in a special negotiations session to resolve an out-of-title grievance involving Principal Administrative Associates, Level I, Police Department Communications Division, that had been filed on October 3, 1983. At this meeting the office of Municipal Labor Relations presented a proposal which the Union rejected because the Police Department was unwilling to grant retroactivity back to the date the grievance was filed, although they admitted that the Principal Administrative Associates, Level I, had been doing out-of-title work.

> Then, the Police Department unilaterally implemented their proposal on August 16, 1985 ... upgrading the Principal Administrative Associates, Level I, to Principal Administrative Associates, Level II.
>
> Such unilateral action by the Employer is violative of [Sections 1173-4.2a(1), (2), (3) and (4) of the New York City Collective Bargaining Law ("NYCCBL").]

On December 30, 1985, the City of New York ("City" or "respondent"), appearing by its office of Municipal Labor Relations ("OMLR"), filed a motion to dismiss the petition, to which CWA responded on February 4, 1986. On March 31, 1986, the Board of Collective Bargaining ("Board") issued an interim decision (No. B-20-86) denying the motion to dismiss with respect to the alleged violation of Section 1173-4.2a(4) and directing that respondent filed an answer to this charge within ten days.

After receiving an extension of time in which to file its answer, the City duly submitted the responsive pleading on June 19, 1986. Thereafter, at the request of the parties, proceedings before the Board were suspended pending settlement discussions concerning the issues underlying the petition and the related out-of-title grievance. On March 9, 1987, petitioner, by its attorney, advised the Office of Collective Bargaining "(OCB)" that settlement discussions had failed and sought additional time in which to respond to the City's answer.

On March 16, 198"1, CWA submitted its reply.

Background

The dispute in this matter involves Principal Administrative Associates (PAAs) who are designated as Assistant Platoon Commanders in the Communications ("911") Division of the New York City Police Department ("Department").[1] Assistant Platoon Commanders supervise employees in the title Supervising Police Communications Technicians (SPCTs) who, in turn, serve as Borough Coordinators in the Communications Division. In its grievance, filed on or about October 3, 1983, the petitioner herein asserted that Assistant Platoon Commanders, classified as PAA, Level I, were in fact performing the work of PAAs classified at Level III; it sought to have the grievants upgraded to and paid at the salary rate of Level III, with payment retroactive to October 3, 1983.

Thereafter, it is alleged by the respondent herein, in order to remedy a situation whereby Assistant Platoon Commanders were, at times, earning a lower salary than the SPCTs they supervised, the Police Department, based upon position audits conducted by the Department of

[1]"Assistant Platoon Commander" is an office title and is the highest level at which civilians are employed in the Communications Division.

Personnel, drew up a proposal for staffing in the Communications Division that would "recognize the level of responsibility of the supervisory positions and compensate them accordingly." That proposal entailed upgrading the position of Assistant Platoon Commander to PAA, Level II and the position of Borough Coordinator to Level I.

On January 22, 1965, a labor-management meeting was held in an attempt to resolve, inter alia, issues relating to petitioner's out-of-title grievance, including the matter of the appropriate PAA level for Assistant Platoon Commanders. Present at the meeting were representatives of CWA, the Police Department and OMLR. The Department informed CWA at that time of the aforementioned staffing proposal, which petitioner rejected because it failed to include retroactive pay for the upgraded PAAs. Thereafter, on August 16, 1985, the Department implemented its proposed plan.

Positions of the Parties

Petitioner's Position

CWA contends that the City's unilateral implementation of the staffing proposal rejected by petitioner at the

labor-management meeting on January 22, 1985 constitutes a refusal to bargain in good faith and a violation of Section 1173-4.2a(4) of the NYCCBL.[2] Implicit in petitioner's charge is the contention that the labor-management meeting was the equivalent, for purposes of the duty to bargain, of collective bargaining negotiations. CWA also asserts that the subject of the proposal unilaterally implemented by respondent is wage rates, which is a mandatory subject of bargaining.

In response to the City's affirmative defenses, CWA contends that the instant case does not involve matters of classification which, it concedes, are management prerogatives. According to petitioner, the City's violation of the statute consists in the fact that, after the January 22nd settlement discussions failed to produce agreement, respondent undertook to consider further the matters raised at the meeting and to report back to the

[2]NYCCBL Section 1173-4.2a(4) provides:

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

union. It did not do so however and instead, without bargaining and without giving notice to CWA, it unilaterally upgraded the grievants and increased their salaries.

Petitioner seeks an order directing respondent to refrain in the future from implementing proposals that are under consideration at the bargaining table without the consent of the union, and seeks an apology from respondent for having acted unilaterally in this matter.

Respondent's Position

The City does not deny that, effective August 16, 1985, it upgraded the positions of the Assistant Platoon Commanders in the Communications Division from PAA, Level I to PAA, Level II. However, respondent asserts that it did not commit any improper practice under the NYCCBL, as it acted within its management rights pursuant to section 1173-4.3b to decide how employees will be classified and to determine the grade or assignment level of a particular position.[3]

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[3]NYCCBL Section 1173-4.3b provides:

> It is the right of the city, or any public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty
>
> (continued...)

OMLR maintains that labor-management meetings are not negotiating sessions. However, assuming arguendo that the labor-management meeting of January 22, 1985 was a negotiating session, respondent asserts, the fact that the classification of Assistant Platoon Commanders was discussed did not transform that issue from a permissive to a mandatory subject of bargaining. Respondent concludes that the failure of the parties to reach an agreement left the City free to act unilaterally within the area of its managerial rights.

In its affirmation in support of the motion to dismiss the petition, filed on December 30, 1985, respondent conceded that CWA might continue to grieve the retroactive pay issue involved in the out-of-title claim and ultimately to submit the issue to arbitration.

(...continued)

> because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

Based upon the foregoing arguments and considerations, respondent asserts that the petition should be dismissed.

Discussion

In our interim decision in this matter, we observed that, in the context of the grievance procedure,

> 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. (Decision B-20-86 at 8)

However, under the circumstances presented here, the parties had voluntarily suspended the grievance procedure in order to negotiate a settlement.[4] Petitioner was awaiting a response to its last statement of position in the settlement talks when the City unilaterally upgraded the grievants in accordance with its own proposal, which had been rejected by CWA. The essential thrust of the union's

[4]While respondent has asserted that "labor-management meetings are not negotiating sessions," it is clear from all of the evidence, including statements by respondent's representatives, that the labor-management meeting of January 22, 1985 did involve discussion, inter alia, of issues raised in the out-of-title grievance with a view toward resolving those issues. Accordingly, we are satisfied that this meeting fairly may be characterized either as a negotiation session or as a-grievance meeting.

case, as we noted in the interim decision, is that the City, having induced petitioner to await further communication from OMLR and having remained silent for seven months, violated its duty to bargain when it subsequently acted unilaterally and without notice to the union on the very matters thus held in abeyance. We held that the facts alleged in the petition provided prima facie support for a finding of refusal to bargain and we invited the City to supply, by way of its answer, additional facts relating to the seven-month hiatus between the January meeting and the August upgrading of the grievants which might have some bearing on the allegations of improper practice.

We have carefully considered the City's answer in this matter and find that, while it elucidates the Department's motivation for upgrading the grievants, indicating that this action was but one element of a larger plan to restructure the Communications Division, essentially the City's version of the facts is not inconsistent with the allegations of the petition. That the Police Department was concerned with larger organizational Problems when it developed and implemented its staffing proposal and, in connection therewith, upgraded certain employees does not alter or excuse the fact that

the City failed to get back to the union with respect to matters that were the subject of ongoing negotiation or grievance settlement discussions.

However, we are aware that, after the upgradings on August 16, 1985, the parties resumed the processing of an out-of-title grievance on behalf of the Assistant Platoon Commanders. A Step III decision denying the grievance was issued by the OMLR Review Officer on October 29, 1985; a request for arbitration was filed on November 15, 1985; and a second hearing in that matter is scheduled to take place on September 15, 1987.[5] Moreover, it appears that all of the issues initially raised by the union in its grievance, including the appropriate remedy for any violation of the contract, are before an arbitrator. Under these circumstances, it is clear that a finding of improper practice by this Board would have no practical legal effect upon the underlying controversy. Therefore, we shall leave the parties to their contractual remedies and dismiss the instant petition as moot.

O R D E R

Pursuant to the powers vested in the Board of Collec-

[5]Docket No. A-2254-85.

tive Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by the Communications Workers of America in the matter docketed as BCB-828-85 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
July 22, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

PATRICK F. X. MULHEARN
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