UPOA v. City, DOP, 41 OCB 55 (BCB 1988) [Decision No. B-55-88 (IP)]

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

-between-

United Probation Officers
Association,

DECISION ON. B-55-88

Petitioner,

DOCKET NO. BCB-1069-88

-and-

City of New York,
Department of Probation

Respondents.
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DECISION AND ORDER

The United Probation officers Association ("the Union" or "the UPOA") filed a verified improper practice petition on July 20, 1988. In its petition, the Union alleges that the City of New York, Department of Probation ("the City") violated sections 12-306(a)(1) and (4) of the New York City Collective Bargaining Law ("NYCCBL")[1] when it failed to bargain over its decision to deny certain employees a shortened work week. It contends that the City thereby unilaterally changed the terms and conditions of their

[1]a. 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 12-305 of this chapter; ...

(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.

employment. The City filed a motion to dismiss on August 15, 1988, to which the union responded on August 26, 1988. On September 22, 1988, the Board of Collective Bargaining requested supplemental briefs from the parties, which were submitted on October 11, 1988.

## BACKGROUND

The UPOA's improper practice charge concerns an alleged change in the terms and conditions set forth in the 1980 - 1982 Citywide Collective Bargaining Agreement ("the Agreement"). Article V, Section 18 of the Agreement provides in pertinent part as follows:

> a. Shortened workday schedules or heat days in lieu thereof for employees who traditionally enjoyed shortened workday schedules or heat days in lieu thereof shall begin on July 1 and terminate on Labor Day.
>
> b. Shortened workday schedules and heat days in lieu thereof shall be abolished for employees who work in air conditioned facilities . . .

The Union maintains that employees working in rooms 1420B, 1404, 1405 and 1406 of an allegedly non-air conditioned facility at 100 Centre Street were granted a shortened work week in 1987 and denied the same this year It has already filed two Step III grievances alleging that this denial constitutes a contract violation.

In the instant improper practice petition, the Union argues that the City unilaterally changed the terms and conditions of its members' employment. As a remedy, it seeks an order requiring the City to cease and desist from

refusing to bargain over this unilateral change, to bargain over it and to restore the status quo ante.

## Positions of the Parties

### City's Position

The City raises two arguments in opposition to the Union's improper practice petition. Initially, it contends that this Board does not have jurisdiction to consider the instant dispute because the gravamen of the petition is subject to a collective bargaining agreement. Alternatively, the City maintains that absent special and unique circumstances which do not exist in this case, the subject of summer hours may only be bargained at the Citywide level.

With respect to its first assertion, the City argues that this dispute is beyond the Board's jurisdiction because it involves a contractual violation. It maintains that Civil Service Law Section 205.5(d), which is applicable to this agency, specifically provides that "the Board shall not have authority to enforce an agreement between an employer and an employee organization . . . " In further support of its position, the City cites Addison Central School District and Addison Teacher's Association[2] and Decision No. B-21-88 (ES). It contends that in Addison Central School District, when PERB was presented with a similar situation, it dismissed an improper practice petition an the ground that the disputed issue was addressed in the parties'

[2]20 PERB 3002 (1987).

collective bargaining agreement and was therefore beyond the jurisdiction of the Board.

Moreover, the City points out that this Board has held the subject of summer hours to be a mandatory subject of bargaining at the Citywide level[3]. It maintains that a Union may negotiate a Citywide subject of bargaining at the unit level only if it demonstrates "special and unique circumstances".[4] Since it asserts that such circumstances do not exist in the instant case, the City argues that bargaining with respect to this subject may be instituted and carried on only by District Council 37, AFSCME, AFL-CIO ("D.C. 37"), the certified collective bargaining agent for career and salary employees at the Citywide level[5]. Consequently, the City contends that the Board can not mandate bargaining over this matter with the UPOA.

Union's Position

The Union maintains that the City has unilaterally changed the terms and conditions of its members' employment, thereby breaching its duty to bargain. It argues that the City has not cited any authority which prohibits the Board from exercising jurisdiction over an improper practice petition which alleges both an improper practice and a contractual violation. The Union also contends that the

[3]The City cites Decision Nos. B-4-69, B-11-68.

[4]The City cites Decision Nos. B-2-73, B-11-68.

[5]The City cites Decision Nos. B-29-86, B-23-85, B-23-75, B-17-75.

instant dispute involves special and unique circumstances which do, in fact, obligate the City to bargain over the issue of summer hours at the unit level.

Initially, the Union points out that the City neglected to fully cite section 205.5(d) of the Civil Service Law in its pleadings. It notes that this section also provides that the Board "shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice." The Union argues that the City has committed an improper practice by refusing to bargain over its denial of the shortened work week, and that its petition therefore states an improper practice which the Board has the authority to remedy.

It distinguishes Addison Central School District which involves a refusal to bargain over the withholding of an individual teacher's salary from the instant case, by maintaining that a breach of the duty to bargain is more evident in a situation where a group of employees rather than a single employee is involved. The Union also contends that the ruling in B-21-88 (ES) is inapposite because it merely holds that a refusal to comply with the terms of an arbitration award is not an improper practice.

Additionally, the Union argues that although the subject of summer hours is bargainable at the Citywide level, it is also bargainable at the unit level in the instant situation. It agrees with the City in that this

Board has held that Citywide subjects may be negotiated at the unit level only if "special and unique circumstances"[6] are shown to exist. However, the Union contends that the instant case presents such circumstances because "the level of comfort in any particular space . . . var[ies] depending on the design and the location of the facility and the specific tasks the employees perform". It also asserts that the City recognized this to be a special situation by granting the instant employees shortened summer hours last year. Consequently, the Union maintains that the City must now bargain over this subject at the unit level.

## Discussion

The City's motion to dismiss presents several issues. First, we must determine whether the instant improper practice petition is within our jurisdiction. If it is, we must then determine whether the City action complained of by the Union constitutes an improper practice and, if so whether it may properly be remedied by an order that the City bargain with the Union over the subject of summer hours at the unit level.

The City notes that section 205.5(d) of the Civil Service Law precludes us from enforcing collective bargaining agreements. However, as the UPOA argues, that provision limits our authority only with regard to alleged contract violations that do not otherwise constitute improper practices. Therefore, since both parties admit in

[6]The Union cites Decision No. B-23-85.

their pleadings that this dispute involves an alleged contractual violation, we must first determine whether it also states facts which form the basis of an independent improper practice.

The UPOA contends that the City committed an improper practice by refusing to bargain over its denial of a shortened work week to the employees in question. "Summer hours" are a term and condition of employment within the scope of collective bargaining,[7] and a refusal to bargain over a term and condition of employment constitutes an improper practice.[8]

In this case, however, the appropriate parties, i.e. the City and D.C. 37, the Citywide representative, have bargained and reached an agreement on this matter, as reflected in Article V, Section 18 of the Citywide Agreement. Negotiation of, and agreement on the subject matter having already occurred, it is through contract administration and enforcement rather than through further negotiation that the parties may seek effectuation of the respective rights and obligations agreed upon regarding "slimmer hours". In filing the instant improper practice petition the UPOA has merely alleged a contract violation which, as the City argues, is beyond our jurisdiction.

Addison Central School District, cited by the City to support its contention that the instant petition should be

[7]NYCCBL 12-307(a).

[8]NYCCBL 12-306(a)(1) and (4).

dismissed, is clearly applicable to this case. In that decision, PERB dismissed an improper practice petition which alleged that a school district improperly deducted outside earnings from the salary of a suspended teacher without negotiating the procedures to be used. The Board held the matter to be outside its jurisdiction because the contract covered the subject of disciplinary procedures and incorporated the suspension provisions of Education Law Section 3020-a. PERB therefore dismissed the petition in its entirety.

We reject the Union's argument that Addison Central School District is distinguishable from the instant case on the ground that a breach of the duty to bargain is more likely to be found where a group of employees rather than a single employee is involved. It has not cited any supporting authority for this contention.

While finding, accordingly, that the City's motion to dismiss the instant petition should be granted, we reject the City's contention that support for its juridictional argument is to be found in Decision No. B-21-88 (ES). In that decision, the Executive Secretary determined that it is not an improper practice to refuse to adhere to an arbitration award. As the Union contends, that holding is inapposite to the instant case because it does not involve an alleged contractual violation.

It is generally our practice to end our examination of a matter upon reaching a finding on any issue which is fully

dispositive of the case as a whole. We depart from that rule in the instant matter, lest the failure to clarify our views of the uniquely convoluted issues presented here leave the parties or others in doubt as to the basis for our disposition of the matter.

Thus we find that there is merit to the City's contention that the subject of slimmer hours can be negotiated only at the Citywide level with D.C. 37. It is undisputed by the parties that this matter is a Citywide subject of bargaining.[9] As they both point out, we have previously held that a Citywide subject may be bargained at the unit level only if a party demonstrates circumstances that are so "special and unique" to a specific class, that the class can not be adequately represented at the Citywide level and is justified in seeking to negotiate a variation from the Citywide Agreement.[10] In the instant case, the Union has failed to prove the existence of such a situation.

The lack of an air conditioned workplace and a prior grant of summer hours do not constitute circumstances "special and unique" to this particular class of employees. The Union has failed to distinguish these employees from other classes of municipal employees who do not work in air conditioned facilities. Consequently, it has not established any basis for requiring the City to negotiate as to "summer hours" at the unit level with the UPOA.

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[9]See also Decision Nos. B-4-69, B-11-68.

[10]See also NYCCBL 12-307(a)(2) and Decision Nos. B-23-75, B-23a-75, B-17-75, B-11-68.

Accordingly, for all the aforementioned reasons, we dismiss the Union's improper practice petition.

O 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 City's motion to dismiss be, and the same hereby is, granted.

Dated: New York, N.Y.
October 25, 1988

MALCOLM D. MacDONALD
CHAIRMAN

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MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
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