L.1549, DC37 v. Jackson (Exec. Dir.), et. al, 41 OCB 60 (BCB 1988) [Decision No. B-60-88 (IP)]

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

-between-

LOCAL 1549, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

DECISION NO. B-60-88

Petitioner,

DOCKET NO. BCB-1031-88

-and-

ANDREA D. JACKSON, as EXECUTIVE DIRECTOR, NEW YORK CITY YOUTH BUREAU,

Respondent.
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DETERMINATION AND ORDER

On February 16, 1988, Local 1549, District Council 37 ("petitioner" or "the Union") filed a verified improper practice petition alleging that the New York City Youth Bureau ("respondent" or "the City") violated section 1173-4.2a(4) (new section 12-306a(4)) of the New York City Collective Bargaining Law ("NYCCBL") by imposing unilaterally a new system for the verification of employee lateness due to train delay. On March 23, 1988, respondent, appearing by its Office of Municipal Labor Relations, filed an answer to the petition. The Union did not submit a reply.

Background

On April 7, 1987, the New York City Youth Bureau advised its staff that a new system for the reporting and verification of employee lateness due to train delay would be implemented. Effective April 20, 1987, instead of submitting a "train delay verification card" from the New York City Transit Authority, employees were directed to complete a "Certification of Claimed Time Delay" form and to submit it together with their time card for the week in which the delay occurred. If the lateness claimed to be due to train delay agreed with the delay reported on the official Transit Authority delay verification printout, it would be excused. Any amount of lateness which exceeded the officially reported delay would be charged against an employee's leave balance.[1]

Positions of the Parties

Petitioner's Position

Petitioner asserts that employee lateness policy is a mandatory subject of bargaining and that a unilateral change in the train delay policy therefore constitutes

[1] Memoranda to this effect, dated April 7, 1987 and April 8, 1987 from Michele F. Berman to Staff, NYC Youth Bureau, are annexed to the petition.

an improper practice in violation of section 12-306a(4) of the NYCCBL.[2] Petitioner also alleges that the change in the train delay policy has resulted in Youth Bureau employees being docked time for verified train delays. As a remedy, petitioner seeks an order directing the City to cease and desist implementation of the new train delay policy; to restore to employees any time improperly deducted; and to bargain in good faith concerning a change in the lateness policy.

Respondent's Position

Respondent asserts that the petition should be dismissed because it was not timely filed within the four-month limitation period prescribed in section 7.4 of the Revised Consolidated Rules of the Office of

[2] Section 12-306a of the NYCCBL provides, in pertinent part:

> **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.

Collective Bargaining ("OCB Rules").[3] The City notes that the memoranda announcing the change in policy were issued on April 7 and 8 of 1987, while the petition was filed on February 16, 1988, more than ten months later.

With respect to the substance of the petition, respondent contends that the means to be used to verify lateness due to subway delay is not a mandatory subject of bargaining, but lies within management's statutory right to:

> determine the standards of services to be offered by its agencies; direct its employees; take disciplinary action; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted .... [NYCCBL §12-306b].

The City argues that petitioner has failed to establish that management waived its statutory right to implement a more accurate and efficient system for verifying transit delay and has not demonstrated any limitation on the City's freedom to act unilaterally in this area.

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[3] Section 7.4 of the OCB rules provides, in pertinent part:

> 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 [12-306] of the statute may be filed with the Board within four (4) months thereof ....

In the alternative, respondent argues, this matter is covered by the Citywide Collective Bargaining Agreement ("the Citywide Agreement") which provides, at Article V, Section 16d, as follows:

> Lateness beyond the five-minute grace period shall be classified as "excused" or "not excused" and excused lateness shall not be charged against the employee. Lateness found by the agency head or the individual designated by the agency head to have been caused by transportation circumstances beyond the ability of the tardy employee to control shall be excused. Such findings shall be reasonably made; and the tardy employee may be required to furnish proof satisfactory to the agency head of the cause of the lateness. A request for excusal shall not be unreasonably denied. A refusal to excuse a lateness may be appealed to the Director of Municipal Labor Relations whose decision shall be final [emphasis added].

Accordingly, the City asserts, the issue raised in the petition should be addressed through the grievance and arbitration procedures of the Citywide Agreement. Respondent argues that, under the terms of section 205.5(d) of the Taylor Law, the Board lacks jurisdiction to consider a claim of contract violation where, as here, the claim does not otherwise constitute an

improper practice.[4]

Finally, respondent argues that the Union lacks standing to file the instant petition because the subject matter of excused lateness is covered by the Citywide Agreement and therefore can only be raised by District Council 37 ("D.C. 37"), the designated bargaining representative for Citywide matters.

For all of the aforementioned reasons, the City submits that the petition should be dismissed.

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[4] Section 205.5(d) of the Taylor Law, which applies to this Board pursuant to §212 of that law, provides, in pertinent part:

> 5. In addition to the powers and functions provided in other sections of this article, the board shall have the following powers and functions:
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> (d) To establish procedures for the prevention of improper employer and employee organization practices as provided in section two hundred nine-a of this article, and to issue a decision and order directing an offending party to cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of this article ... provided, however, the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice (emphasis added).

Discussion

It is apparent that the instant proceeding, initiated on February 16, 1988, was commenced well in excess of four months after the Youth Bureau issued memoranda on April 7 and 8, 1987 announcing the change in its system for verification of train delays and after the announced implementation date of April 20, 1987. In the absence of any evidence or argument that the new system was implemented within four months of the filing of the petition herein or that the four-month limitation period should be measured from the date of some other subsequent event, we must dismiss the petition as time-barred, pursuant to section 7.4 of the OCB Rules. We also note that section 7.9 of the Rules permits a party, at its option, to submit a reply to a respondent's answer which "shall contain admissions or denials of any additional facts or new matter alleged in the answer." In its answer in the instant matter, respondent raised the issue of the untimeliness of the petition, but petitioner did not submit a reply.

We note further that the subject of this petition relates to employee lateness policy, which is a matter covered by the Citywide Agreement. Article V, Section 16d of that Agreement expressly provides that a

"tardy employee may be required to furnish proof satisfactory to the agency head of the cause of the lateness."[5] As the Citywide bargaining representative (D.C. 37) and the City already have negotiated and reached an agreement, at least in general terms, on the subject of verification of the cause of lateness for purposes of determining whether lateness shall be excused, a determination of specific rights and obligations of covered employees arguably is a matter of contract interpretation which may be obtained by means of contract administration and enforcement procedures.

Petitioner's allegation that the new train delay verification procedure has resulted in improper deductions from employee leave balances also appears to raise a claim under Article V, Section 16d of the Citywide agreement, which states, in relevant part, that "[a] request for excusal shall not be unreasonably denied." Article V, Section 16d, we note, provides a limited right of appeal to the Director of Municipal Labor Relations for an employee whose request for excusal has been denied, while, pursuant to Article XV, "a

[5] Article V, Section 16d of the Citywide Agreement is quoted in full at page 5 supra.

dispute concerning the application or interpretation of the terms of [the] Agreement" is subject to the full range of grievance procedures, including arbitration. Therefore, it appears to us that the remedy for any unwarranted deduction for lateness from an employee's leave balance or any other claimed violation of the negotiated employee lateness policy clearly lies in the contractual forum and not with this Board.[6]

In light of our finding herein that the improper practice petition is time-barred, we have not considered the merits of the controversy, nor have we determined whether petitioner, as the unit bargaining representative, would have standing to raise a claim alleging a refusal to bargain over the unilateral change in the train delay verification system. We emphasize, however, that the dismissal of this petition is without prejudice to the timely filing of a grievance by the Citywide bargaining representative relating to the application of the new train delay verification system.

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[6] See, Taylor Law §205.5(d).

ORDER

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 improper practice petition filed by Local 1549, District Council 37, AFSCME, in Docket No. BCB-1031-88 be, and the same hereby is, dismissed.

DATED: New York, New York
November 29, 1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL J. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
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MEMBER