DC37, Taylor, Mack, Lewis v. NYCHA, 45 OCB 1 (BCB 1990) [Decision No. B-1-90 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DECISION NO. B-1-90

DOCKET NO. BCB-1079-88

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, JOHN E. TAYLOR, ZERLEE MACK and WILLIE M. LEWIS,

Petitioners

-and-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On August 19, 1988, District Council 37, AFSCME, AFL-CIO, Local 768, ("the Union"), in behalf of John E. Taylor and Zerlee Mack, filed an improper practice petition against the New York City Housing Authority ("the Authority"). The petition alleges that the Authority committed an improper practice when it unilaterally promulgated a policy restricting employees' participation in tenant organizations and advisory councils that resulted in the discharge of these employees. On October 18, 1988, the Union amended its petition by adding the name of Willie M. Lewis as a petitioner.

After receiving several extensions of time with the consent of the Union, the Authority filed an answer to the amended improper practice petition on April 13, 1989. The Union, after also receiving several time extensions with the consent of the Authority, filed a reply on September 18, 1989.

Background

On January 17, 1987, the Authority adopted Resolution 87-1/21-28 entitled "Resolution Adopting Policy on Authority Employee Participation in Tenant Organizations and Tenant Advisory Council Inc." ("the Resolution.") The resolution reads, in pertinent part, as follows:

> 1. Prohibiting full-time Authority employees, i.e. those who are employed by the Authority for more than 20 hours a week, from serving as officers, delegates, alternates, representatives, or from playing active roles in the T.A.C. or in the tenant organizations of the projects in which they reside; and
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> 2. Permitting part-time Authority employees, i.e. those who are employed for 20 hours or less a week, and full-time Authority employees who work in a seasonal or temporary capacity, to serve as officers, delegates, alternates, representatives or to perform active roles in the T.A.C. or in the tenant organizations of the projects in which they reside, if the T.A.C. or the tenant organizations themselves so permit; and
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> 3. Notwithstanding the aforesaid, permitting Authority employees who currently hold offices or positions as set forth above to retain such offices or positions until the earlier of the termination of their current term of office, or December 31, 1987.

Subsequently, two employees, Zerlee Mack and Willie Lewis, were discharged on April 21, 1988, as a result of allegedly violating Resolution 87-1/21-28. A third employee, John Taylor, was terminated on May 4, 1988, allegedly for committing the same violation.

Positions of the Parties

Union's Position

The Union complains that the Housing Authority, in adopting its tenant committee resolution, unilaterally implemented new work rules prohibiting

participation of its full-time employees in tenant organizations. This resolution allegedly created new terms and conditions of employment for bargaining unit members over which the Authority has refused to bargain. In addition, the Union alleges that the resolution has had a direct impact on the members' employment. The Union requests that the Board find the change and/or its impact to be a mandatory subject of bargaining, and that the Board order the Authority either to bargain over the impact or to rescind the Resolution.

In support of its contention, the Union points out that three employees were discharged as a result of their alleged violation of the new rules. The Union argues that, inasmuch as the Resolution serves as a basis for disciplinary action, it constitutes "new terms and conditions affecting employment of individuals represented by DC 37 and Local 768."

In response to the Authority's challenge to the timeliness of its improper practice petition, the Union claims that it first learned of the policy change on April 21, 1988, when the first two employees were discharged for allegedly violating it. Furthermore, the Union asserts the Authority did not actually inform the Union of the Resolution's existence until May 18, 1988, when it sent the Union a copy of a memorandum, dated December 15, 1987, which allegedly had been distributed to Housing Authority Directors, Chiefs, Managers and Superintendents.[1] Therefore, the Union argues, inasmuch as it had four months from the date that it first became aware of a possible

[1] Memo #383, entitled "Employee Participation in Tenant Organizations and Tenant Advisory Council," reiterates the provisions of the Resolution and instructs supervisors to advise their staffs of the policy and of the fact that they will be held responsible for ensuring compliance with it.

improper practice to file a complaint, the August 19, 1988 filing fell within the statutory period.

Authority's Position

The Authority initially argues that the Union's petition is time barred under Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), which requires that a "petition alleging that a public employer . . . has engaged in . . . an improper practice in violation of Section 12-306 of the statute . . . be filed within four (4) months thereof." The Authority cites several Public Employment Relations Board ("PERB") decisions, which it claims state that the period to challenge an alleged improper practice runs from the time that the improper practice was first committed, unless it was performed in secrecy.[2] The Authority asserts that because the tenant committee policy was adopted at a public meeting on January 21, 1987, the Union should have filed its complaint no later than May 21, 1987.

The Authority also argues that the implementation of Resolution 87-1/21-28 was within its statutory managerial right under Section 12-307b. of the New York City Collective Bargaining Law ("NYCCBL") to determine the methods, means

[2] United University Professions, 21 PERB ¶4590 (1988) (citing Board of Education of the CSD of the City of New Chamberlain, 15 PERB ¶3050 (1982), aff'g 14 PERB ¶4659 (1981); Hauppauge Teachers Association v. New York State Public Employment Relations Board, 116 A.D.2d 816, 497 N.Y.S.2d 198, aff'g Hauppauge Teachers Association, 17 PERB ¶3051 (1984); Northport-East Northport Union Free School District, 13 PERB ¶4560 (1980).

and personnel by which government operations are to be conducted.[3] More specifically, the Authority asserts it enacted the rule to prevent employee conflicts of interest and to ensure that tenant organizations will be free of management influence. The Authority claims that since the establishment of work rules and personnel practices is within its management prerogative, it has no duty to bargain over the enforcement or impact of the Resolution. Thus, the Authority requests that the Board dismiss the petition in its entirety.

Discussion

Timeliness

Section 7.4 of the OCB Rules establishes a statute of limitations for improper practice proceedings under the NYCCBL, requiring that an improper practice petition be filed within four months of the alleged violation. Timeliness is an affirmative defense which must be pleaded and proved by the

[3] Section 12-307b. provides, in pertinent part, as follows:

> It is the right of the city, or any other 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 because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government 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.

responding party.[4] It is not initially the burden of the petitioner to establish the timeliness of its claim.[5]

Although the Authority argues that Resolution 87-1/21-28 was passed on January 17, 1987, and that Memo #383 was distributed to supervisors on December 15, 1987, it does not provide evidence of when the Union or employees were first given notice of the policy or when they were first affected by it. The Union, on the other hand, maintains that it only learned of the policy when two of its members were discharged for violating it on April 21, 1988. Although the Authority argues that the Union had constructive notice of the Resolution because the proceeding through which it was adopted was public, and because Memo #383 concerning the Resolution had been distributed to its managers, the Authority gives no evidence to support this contention.

Moreover, in previous cases involving the application of Rule 7.4, we have held that a union appropriately interposes itself only after an action of management has had an "immediate impact on the employees represented by the union or necessarily entails such impact in the immediate or foreseeable future."[6] Since the Authority failed to demonstrate that the Union was aware of the policy's existence prior to the discharge of the three employees named in this complaint, we find that the accrual period must be measured from April 21, 1988, the date that the first two employees were dismissed. Inasmuch as

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[4] Decision Nos. B-42-88 and B-44-86.

[5] Decision No. B-44-86.

[6] Decision Nos. B-42-88 and B-44-86.

the complaint was filed within four months of that date, the petition is not untimely.

The Merits

Having found that the improper practice charge is not time-barred, we go on to consider the substantive allegations that it raises. The Union's claim includes two issues: First, the tenant committee policy allegedly is a mandatory subject of bargaining that may not unilaterally be imposed because it constitutes a change in a term and condition of employment; and second, the imposition of the policy allegedly has had a practical impact on members of the bargaining unit. The Authority contends that the unilateral implementation of the policy is defensible in all respects as an exercise of its statutory managerial prerogative. We shall discuss the issues in light of each of these contentions.

Promulgation of the Tenant Organizations Resolution as a Mandatory Subject of Bargaining

The essence of both the Taylor Law and the New York City Collective Bargaining Law is the obligation placed upon public employers to negotiate with and enter into written agreements with recognized and certified public employee organizations regarding wages, hours, and terms and conditions of employment for unit employees. However, neither statute expressly delineates the scope of working conditions. Thus, the elaboration of the extent of the duty to negotiate has been left to the expertise of either the Public

Employment Relations Board or this Board for determination on a case-by-case basis.

In the abstract, it may be argued that any subject which has a significant or material relationship to a condition of employment should be designated a mandatory subject of bargaining. However, this Board, the PERB, and the National Labor Relations Board have each restricted the scope of bargaining whenever it intrudes into those areas that primarily involve a basic goal or mission of the employer. When we encounter a conflict between the employer's prerogative to control the basic direction of its enterprise and the right of employees to bargain on subjects that affect their terms and conditions of their employment, we must strike a balance between the vital interests of government to manage its affairs on the one hand, and the public policy underlying the bargaining obligation of the NYCCBL and the Taylor Law on the other.[7] In addition, under the NYCCBL, we must take into account the employer's express statutory prerogative, under §12-307b., to determine how to run its business, including its right generally to promulgate personnel policies and practices.

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[7] See Fibreboard Corp. v. NLRB, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964); Newspaper Guild, Local 10 v. NLRB, 636 F.2d 550 (D.C. Cir. 1980); See also, Board of Education of the City School District of the City of New York v. United Federation of Teachers, Local 2, AFT, AFL-CIO, 19 PERB ¶3015 (1986) at 3033, rev'd 542 N.Y.S.2d 53 (A.D. 3 Dept. 1989), appeal filed; State of New York v. Civil Service Employee Association, Inc., Local 1000, AFSCME, AFL-CIO 18 PERB ¶3064 (1985); County of Rensselaer v. Rensselaer County Unit of the Rensselaer County Local 842, CSEA, Local 1000, AFSCME, AFL-CIO 13 PERB ¶3080 (1980).

Because the duty to bargain in §12-307a. of the NYCCBL and in §204.3 of the Taylor Law is similar to the private sector obligation to bargain found in §8(d) of the National Labor Relations Act,[8] frequently we have used NLRB decisions to provide an analytical framework for a variety of our duty to bargain decisions. We find it appropriate to do so in this case.

In Ford Motor Co. v. NLRB,[9] the U.S. Supreme Court defined mandatory subjects of bargaining as such matters that are "plainly germane to the working environment" and that are "not among those managerial decisions which lie at the core of entrepreneurial control." The Court also reiterated that

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[8] Section 8(d) of the NLRA reads, in pertinent part, as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

Section 204.3. of the Taylor Law reads, in pertinent part, as follows:

> For the purpose of this article, to negotiate collectively is the performance of the mutual obligation of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

Section 12-307a. of the NYCCBL reads, in pertinent part, as follows:

> [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages . . . hours . . . [and] working conditions . . . .

[9] 441 U.S. 488, 101 LRRM 2222 (1979).

"the classification of bargaining subjects as terms or conditions of employment is a matter concerning which the Board has special expertise," and that "its judgment as to what is a mandatory bargaining subject is entitled to considerable deference."

The Ford Motor Co. decision was predicated upon the language of Section 8(d) of the NLRA. Inasmuch as §8(d) is substantially the same as the parallel provisions of the Taylor Law and the NYCCBL, the test that the Supreme Court created in Ford is suitable for use in the matter presently before us. Thus, before we will find that the Authority's tenant committee policy constitutes a mandatory subject of bargaining, we must first determine that the policy is plainly germane to the working environment. If we find it germane, we then also must find that it is not among those managerial decisions which lie at the core of entrepreneurial control.

As to the first factor -- germane to the working environment -- we view the effect of the tenant committee policy as being substantially the same as a policy involving a residency requirement, and we will analyze it on that basis.

The PERB has discussed residency requirements in a line of

cases,[10] holding that although a residency requirement for initial employment is a managerial prerogative, such a requirement may not be imposed on current employees who were hired before the requirement took effect. Thus, in Rensselaer City School District, the PERB determined that residency as a criterion for appointment or promotion is a managerial prerogative "if applicable only to prospective employees or to future promotion of current employees."

Likewise, in County of Westchester, when the legislature enacted a residency law requiring employees who were county residents at the time of the law's enactment to maintain their residence or else be discharged, a PERB hearing officer ruled that the unilateral action was in violation of the duty to bargain in good faith. "[I]t is an improper practice to require employees not previously subject to such a law to establish or maintain local residency thereafter as a condition of employment." The hearing officer concluded that as far as existing employees were concerned, the residency requirement was mandatorily negotiable.

An Opinion of Counsel effectively sums up the history of residency requirements and their limited application to current employees, reaffirming that residency requirements may be applied only to prospective employees or for future promotions.[11]

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[10] See Town of Tonawanda Police Club, 16 PERB ¶4527 (1983); Rensselaer City School District, 13 PERB ¶3051 (1980), aff'd. 15 PERB ¶7003 (App. Div. 3rd Dept. 1982); County of Westchester, 13 PERB ¶4586 (1979); and Salamanca Police Unit, 12 PERB ¶3079 (1979).

[11] 16 PERB 5001.

Imposing a tenant committee policy upon current Housing Authority employees which would force them to give up positions that they presently hold on these committees or lose their jobs is the equivalent of imposing a residency requirement upon them. Relying upon the underlying rationale of the residency cases, we find that the tenant committee policy affects a condition of employment because it has the potential to terminate the continued employment of employees who are subject to it. We conclude, therefore, that the policy is plainly germane to the working environment. Thus, the first part of the Supreme Court's definition of what constitutes a mandatory subject of bargaining is satisfied.

The second part of the test requires that the matter in question not be among those managerial decisions that lie at the core of entrepreneurial control. In its discussion of this subject, the Court relied upon the concurring opinion of Justice Stewart in Fibreboard Corp.:[12]

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entre- preneurial control. Decisions concerning
> . . . the basic scope of the enterprise are not in themselves primarily about conditions of employment. . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.

The Housing Authority is the agency responsible for the administration and supervision of public housing developments throughout the City of New

[12] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 222, 57 LRRM 2609 (1964).

York, and it is beyond question that the Authority has a fundamental interest in maintaining harmonious and stable landlord-tenant relations. It asserts that the tenant committee policy was promulgated "to ensure that the tenant organization will be free of management influence." We find reasonable the Authority's belief that when its employees serve as members of tenant committees, tenants suspect that the employees' loyalties are divided. We find further that such a perception, even if unfounded, arguably would jeopardize the stability of the landlord-tenant relationship.

We hold, therefore, that the Housing Authority's tenant committee policy is not primarily about a condition of employment. Rather, it was reasonably designed to counteract a perception of conflict of interest. The policy thus qualifies as being fundamental to the basic direction of the Authority's enterprise and lying at the core of its entrepreneurial control. As such, the tenant committee policy is excluded from mandatory negotiations because it fails to satisfy the second part of the Supreme Court's definition of a mandatory subject of bargaining.

Duty to Negotiate Over the Impact of the Tenant Organizations Resolution

Inasmuch as the tenant committee policy constitutes a nonmandatory subject of bargaining, generally there would be no requirement for the Housing Authority to negotiate over the policy's implementation. However, since the Authority has linked the promulgation of the policy to its managerial authority under Section 12-307b. of the NYCCBL, an exception to the general

rule arises under the final provision of this section concerning practical impact.

The statutory management rights clause provides that a decision made by an employer in the exercise of its management prerogatives, and, thus, outside the scope of bargaining, may give rise to issues within the scope of bargaining concerning the practical impact such decision has on matters of employment, such as questions of workload, manning or safety. The practical impact language of Section 12-307b. was designed to cushion or reduce, as much as possible, the adverse effects upon employees arising from the exercise of management prerogative.[13]

We have already said that the Tenant Organizations Resolution at issue in this case, which restricts employee participation in tenant committees, falls within management's prerogative to prevent conflicts of interest that could arise when employees serve as representatives of both the Housing Authority and the tenant committees that deal with the Authority. We also must consider, however, the Union's contention that the implementation of the Resolution had a direct practical impact on a matter of employment, thus requiring bargaining.

The Union's sole supporting argument for this contention is that the implementation of the policy has led to the termination of three employees. The right to take disciplinary action is expressly reserved to management in Section 12-307b. of the NYCCBL. Also implicit in management's authority is its right to make and promulgate rules and policies in furtherance of the

[13] Decision No. B-18-75.

performance of its mission. It follows, therefore, that management's disciplinary powers may be exercised whenever a management rule or decision has been violated. It would be impractical and contrary to the policy of the NYCCBL to consider every managerial decision made within the scope of its statutory prerogative as giving rise to a practical impact, solely because an employee who does not conform to the decision could suffer the imposition of disciplinary action. Such a finding by this Board would completely eradicate the concept of employer prerogative.

In this case, the Union has shown no effect of the Resolution beyond the discipline of three violators of the rule. Without evidence of direct repercussions upon other employees who have followed the employer directive, we cannot make a finding of practical impact.[14]

In summary, we find that the Housing Authority's tenant committee policy is a nonmandatory subject of bargaining because, although it is germane to the working environment, it also is a managerial decision which lies at the core of entrepreneurial control, and thus, is not mandatorily bargainable. We also find that because the Union has not stated any facts that raise a substantial issue of practical impact, there is no basis for us to find that a practical impact attaches to the tenant committee policy.

Accordingly, we find that the Policy on Authority Employee Participation in Tenant Organizations and Tenant Advisory Council Inc., adopted by the Housing Authority in its January 17, 1987 Resolution, does not constitute an

[14] Decision Nos. B-38-88; B-37-82; B-34-82 and B-27-80.

improper practice within the meaning of Section 12-306a.(4) of the NYCCBL, and we will dismiss the instant scope of bargaining petition.

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 herein by District Council 37, AFSCME, AFL-CIO, Local 768, and docketed as BCB-1079-88 be, and the same hereby is, dismissed.

DATED: New York, New York
January 22, 1990

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