L.854, UFOA, IAFF v. City, 45 OCB 5 (BCB 1990) [Decision No. B-5-90 (IP)]

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

-between-

UNIFORMED FIRE OFFICERS ASSOCIATION LOCAL 854, IAFF, AFL-CIO,

Petitioner,

-and-

CITY of NEW YORK,

Respondent.
----------x

DECISION NO. B-5-90

DOCKET NO. BCB-1186-89

DECISION AND ORDER

On July 24, 1989, the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO, ("the Union") filed a verified improper practice petition against the City of New York ("the City"). The petition charges that the New York City Fire Department ("the Department") committed an improper practice in violation of Section 12-305 (formerly Section 1173-4.1) of the New York City Collective Bargaining Law ("NYCCBL") when it unilaterally amended its departmental rules so as to prohibit unit members from soliciting or contributing funds to pay members' disciplinary fines or assessments.

The City, appearing by its Office of Municipal Labor Relations, filed a verified answer to the improper practice petition on September 8, 1989. The Union filed a verified reply on October 23, 1989.

Background

Section 25.2.2 of the Rules and Regulations of the Fire Department ("Rule 25.2.2"), which has been in existence since at least June 30, 1986, restricts solicitation and contribution by members of the Department. Rule 25.2.2 reads as follows:

> Members shall not solicit or contribute, nor cause to be solicited or contributed, any money or other valuable article or thing, to be used in connection with a matter affecting the Department, without the approval of the Fire Commissioner. This does not

> apply to money collected for house assessments, com- pany commissary, dues of official Department-al organizations, or other authorized pur- poses.

On or about May 18, 1989, the Department amended Rule 25.2.2 by issuing an order which reads as follows:

> SOLICITATION OR CONTRIBUTION OF FUNDS
> Section 25.2.2 of the Rules and Regulations prohibits the solicitation or contribution, or causing to be solicited or contributed, any money to be used in a matter affecting the Department without the approval of the Fire Commissioner. This section is applicable to disciplinary fines and assess- ments. Collecting funds to pay for such fines and assessments is strictly prohibited.
> All members will be held strictly accountable for compliance with this order and the associated section of the Rules and Regulations governing the Uniformed Force. Chief and Company officers will be held strictly accountable for enforcement. Violations may be reported directly to the Bureau of Investigations and Trials at (718) 403-1220.

Prior to the amendment of Rule 25.2.2, the Department had not construed or applied it in such a way as to prohibit members of a Fire Department bargaining unit from soliciting or contributing funds to pay one another's disciplinary fines or assessments.

Positions of the Parties

Union's Position

The Union maintains that before Rule 25.2.2 was amended in May of 1989, it had been a common practice for Department members to make joint contributions toward the payment of disciplinary fines whenever members regarded the discipline as improper. In support of its contention that the amendment of the Rule constitutes a substantive policy change, the Union points to the City's acknowledgement that the Department had not previously prohibited the solicitation or payment of members' fines. In strongly disputing the City's claim that the amendment merely "clarifies" the

regulation, the Union maintains that the amendment, in fact, reverses a practice that had always been regarded as permissible conduct.

At the very least, the Union contends, the amendment of Rule 25.2.2 constitutes a new predicate for discipline. According to the Union, implementation of a policy change that makes members of a bargaining unit subject to discipline for the first time is sufficient to require bargaining. Moreover, the Union argues, the amendment imposes a significant limitation upon the uses to which bargaining unit members may apply their compensation for their own purposes and for purposes protected by the NYCCBL.

Disputing the claim that the Department had the managerial right to promulgate the amendment of the Rule, the Union contends that the Department is restricted from doing so, not only because of the amendment's disciplinary component, but because the amendment makes a unilateral change in a term and condition of employment by imposing a new condition for continued employment. According to the Union, such a change amounts to a mandatory subject of bargaining.

Concerning the City's timeliness defense, the Union argues that the original application of Rule 25.2.2 had never prohibited solicitation and contribution of money among members. In the Union's view, the amendment is so broad that it amounts to a new policy. The Union denies that a literal reading of the original Rule, as urged by the City, has always prohibited the solicitation. It points out that according to the City's interpretation, the pre-amendment regulation would also have prohibited the collection of union dues, agency fees, legal fees used to challenge the scoring of promotional examinations, and political contributions to candidates based upon their policies and promises regarding the Department. The Union claims that Rule 25.2.2 has never been applied in that way, and that such application would have been unconstitutional and illegal if it had been.

Finally, the Union contends that the amended Rule prohibits employees

from fully exercising their right of self-organization by preventing them from joining together in a concerted fashion to respond to what they regard as improper disciplinary action. According to the Union, the amendment denies unit members their right to engage in concerted activity, a right that "is guaranteed by the New York City Collective Bargaining Law."

City's Position

The City contends that when the Fire Department issued the May 1989 amendment to Rule 25.2.2, the rule was merely being "clarified." The City goes on to explain that amendment of the rule was prompted when the Department learned that the original rule was being violated by employees who were collecting money to pay for one anothers' fines.

According to the City, the amendment to clarify Rule 25.2.2 was a proper exercise of the Fire Department's statutory

managerial rights, under Section 12-307b. of the NYCCBL,[1] which authorizes management to take disciplinary action, determine the methods and means by which governmental operations are to be conducted, and exercise complete control and discretion over its organization. The City maintains that this statutory managerial authority includes the right to revise work rules and procedures in order to ensure that existing policies are being complied with. Therefore, the City concludes, because the original Rule 25.2.2 was issued as a managerial prerogative, and because the Rule's clarification was made simply to enforce compliance with a broader pre-existing policy, the fact that the amendment can affect the imposition of discipline does not convert it into a mandatory subject of bargaining.

The City also contends that the Union's improper practice charge is time-barred by Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules").[2] It argues that inasmuch as the original rule already prohibited the solicitation or contribution of "any" money to be

---

[1] NYCCBL §12-307b. provides, in pertinent part, as follows:

> It is the right of the city ... acting through its agencies, to ... 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; ... and exercise complete control and discretion over its organization and the technology of performing its work.

[2] OCB Rule 7.4 reads, in pertinent part, as follows:

> A petition alleging that a public employer . . . 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 months thereof . . . .

used in a matter affecting the Fire Department without the approval of the Commissioner, the clarification falls within the scope of the broader pre-existing policy. The City cites Decision No. B-2-85 to support its position that the Union's petition challenging the clarification is thus untimely.

Discussion

The City refers to State of New York v. Troopers P.B.A.[3] to support its argument that the unilateral amendment of a policy that is already covered by a broader pre-existing policy does not constitute a change in a term and condition of employment that must be negotiated. Employing the same rationale, the City further contends that the Union's challenge to the amendment of Fire Department Rule 25.2.2 is untimely. In addition, the City contends that both the promulgation of the original rule and of its amendment were authorized by the Department's statutory management rights authority. The Union, on the other hand, argues that the amendment amounts to a new term and condition of employment that must be negotiated, and that the amendment interferes with its members' organizational rights. We shall address the question of timeliness first, and then we shall discuss the remaining issues.

Timeliness

The question of whether the May 1989 amendment of Rule 25.2.2 was a "clarification," as the City maintains, or new policy, as the Union contends, is central to our discussion of timeliness. If the City is correct, then the Union's charge is untimely; if the Union is correct, then its petition was filed within the time allotted under OCB Rule 7.4.

A fair and objective reading of Rule 25.2.2 in its original form indicates that the rule's purpose was to deter conduct that might bring the

---

[3] State of New York v. P.B.A. of the New York State Troopers, Inc., 20 PERB ¶3038 (1987).

Fire Department into disrepute. We take notice that the Rule appears within a broader category of departmental regulations entitled "Contribution; Solicitations," which target behavior that could be viewed as unethical or corrupt. Rule 25.2.1, for example, regulates the selling or the distribution of tickets for "affairs" and the solicitation of advertisements for affairs; Rule 25.2.3 prohibits gambling in any Department building; and Rule 25.2.4 prohibits the offering of gratuities by members eligible for promotion to any person for the purpose of creating a vacancy to expedite promotions.

We find that the original Rule 25.2.2 was thus aimed at prohibiting practices of various kinds that would be intrinsically corrupt or might be generally perceived as corrupt. We conclude, therefore, that the May 1989 amendment did, in fact, create a new prohibition, by barring members of the Fire Department, for the first time, from soliciting or contributing funds to pay for one anothers' disciplinary fines or assessments.

We distinguish Decision No. B-2-85, cited by the City, because that case involved a new overtime distribution procedure for Fire Alarm Dispatchers that had been in effect, and that unit personnel had actively participated in, for nearly two and one-half years before the improper practice petition challenging the procedure was filed. In the present case, there is no dispute that before May of 1989, Rule 25.2.2 contained no specific language and had never been applied so as to prohibit the solicitation of funds for payment of members' fines.

We also distinguish State of New York v. Troopers P.B.A., supra, by noting that the P.B.A.'s charge concerning the employer's imposition of drug testing was dismissed because the PERB found that the subject of chemical testing was already covered by the parties' collective bargaining agreement. In the case presently before us, the parties have cited no contractual provision that addresses the issue of solicitation of funds for the payment of members' fines.

We find, therefore, that the issue is new, and that it is not untimely.

Solicitation and Distribution of Money
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. The specification is more easily stated than applied, however, for the scope of working conditions may include or exclude a host of borderline or debatable subjects that neither statute expressly delineates.[4] Thus, the elaboration of the extent of the duty to negotiate has been left to the expertise either of the Public Employment Relations Board and of this Board, in their respective jurisdictions, 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 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

[4] Decision No. B-59-89.

on the other.[5] 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.

In a recent decision (District Council 37 v. New York City Housing Authority, Decision No. B-1-90), we announced that where a union alleges that management has violated Section 12-307a. of the NYCCBL by unilaterally altering a working condition that is alleged to be a term or condition of employment, we will apply the test set forth by the United States Supreme Court in Ford Motor Co. v. NLRB.[6] Under the Ford test, before we will require management to bargain over its action, we must find that the action is "plainly germane to the working environment" and "not among those managerial decisions which lie at the core of entrepreneurial control." Thus, before we will order bargaining over the Fire Department's amendment to Rule 25.2.2, we must first determine whether the type of solicitation being prohibited is plainly germane to the working environment. If it is, we must then decide whether it is within or outside the core of the Department's entrepreneurial control.

As to the first factor -- germane to the working environment -- at the outset we note that the City expressly has linked the amendment of Rule 25.2.2

---

[5] 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).

[6] 441 U.S. 488, 101 LRRM 2222 (1979).

to the employment relationship by contending that the decision to "clarify" the rule was an exercise of its statutory managerial prerogative. In addition, we have already found that the amendment of the rule created a new type of solicitation prohibition that forbids, for the first time, the solicitation of funds for payment of members' fines, thereby exposing violators of the new rule to disciplinary action for conduct that previously was permissible.[7] It follows, therefore, that the amended rule, in effect, imposes a new condition of employment upon unit members, thus further associating the policy change with scope of employment matters.[8]

We are thus satisfied that the amendment of Rule 25.2.2 is germane to the working environment. This nexus satisfies the first part of the Supreme

---

[7] Our finding that the amendment of this rule involves a new predicate for discipline is relevant only to the issue of germaneness which is the first part of the Ford test analysis. This finding would not be sufficient to establish a claim of practical impact. As we stated in Decision No. B-1-90:

> 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.

We reiterate this principle. The existence of practical impact is not the question before us, however. In determining whether a challenged management action involves a mandatory subject of bargaining, using the Ford analysis, it is appropriate for us to consider the effect on discipline as an indicium of the action's germaneness to the working environment.

[8] A similar result was reached by the NLRB in Peerless Publications v. Newspaper Guild, Local 10, 124 LRRM 1331 (1987) [supplementing 95 LRRM 1611, remanded 105 LRRM 2001 (D.C. Cir. 1980)]. In Peerless, the Board held that management's attempts to curtail outside political and social activities of its employees by the unilateral imposition of a Code of Ethics "interferes substantially with civil and economic rights of the employees (and indeed their private lives)," and is thus a mandatory subject of bargaining.

Court's definition of what constitutes a mandatory subject of bargaining.

The second part of the Ford 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.:[9]

> 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 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 its disciplinary authority.[10] This authority, however, is not without limitation.[11] Thus, while the Fire Department would be well within its right to increase unilaterally its schedule of fines, for example, it could not tell its employees that they were not allowed to borrow money from relatives or from a bank to pay the disciplinary assessments. Such a restriction would go beyond the scope of management's intrinsic disciplinary authority.

By making employee contributions and donations subject to the prior approval of the fire Commissioner, the amendment to Rule 25.2.2 amounts to a similar kind of restriction. The requirement interferes with the employees' right to spend their wages as they see fit on causes that they wish to

---

[9] Fibreboard Paper Products v. NLRB, supra note 5.

[10] Decision Nos. B-61-89; B-25-81 and B-3-73.

[11] Decision No. B-3-73.

support, which goes beyond the point of imposition of discipline.

Although the present case is one of first impression, both this Board and the PERB have dealt with analogous disputes involving management's attempts to place restrictions on outside employment or "moonlighting." In Decision No. B-43-86, issued in response to a scope of bargaining petition filed by the City, we held that a Union demand that sought to prohibit restrictions from being placed on Fire Marshals' outside employment was a mandatory subject of bargaining. Relying in part upon the PERB's decision in City of Newburgh,[12] we said that limitations placed upon employees' time off detracts from their opportunities to enjoy and use their free time in a manner of their own choosing. Although we acknowledged that management has a unilateral right to assign its personnel, and that it may seek to impose some limitations upon its employees at times when they would normally be off duty, we said that such authority "cannot be construed so as to preclude the Union from negotiating over unit members' right to use their time when they are off-duty."[13]

These findings are consonant with American industrial practice concerning off-duty conduct.[14] In general, considerations of employees' right to privacy as well as concerns for the application of due process in arbitration have led arbitrators to find that unless behavior away from the plant harms a company's reputation or product, renders an employee unable to perform his or her duties or appear at work, or leads to refusal or inability

---

[12] Local 589, International Association of Fire Fighters v. City of Newburgh, 16 PERB ¶3030 (1983) (a matter dealing with the "extent and quality of unit employees' time off" is a mandatory subject of negotiation.)

[13] Decision No. B-43-86 at 25.

[14] See Elkouri and Elkouri, How Arbitration Works, "Conduct Away From the Plant" (Bureau of National Affairs, Inc., 4th ed. 1985).

of other employees to work with the employee, there is no basis for an employer to interfere with an employee's private life.[15]

In this case, we do not believe that the solicitation and contributions of money among employees publicly stigmatize the Department, nor do we see how the employer is harmed by them. If the City believes that the contributions diminish the measure of punishment that the Fire Department metes out for a particular rule infraction, there are other ways that this effect can be mitigated.

In light of all of the above factors, we hold that the Fire Department's amendment to Rule 25.2.2 is not fundamental to its authority to impose discipline, nor does it lie at the core of the Department's entrepreneurial control. Both elements of the Ford test thus being satisfied, we find that the amendment of Rule 25.2.2 constitutes a mandatory subject of bargaining.

Further, we find that the right to bargain, in this case, is not diminished by operation of Section 12-307b. of the NYCCBL, the statutory management rights provision. Although §12-307b. provides management with broad authority to determine how best to conduct and control its operations and to take disciplinary action against its employees, the right to manage is not an unlimited delegation of power. Management prerogative does not shield the City from an examination of the actions it claims to have had the authority to take.[16] When competing interests exist between the statutory management rights provisions and a mandatory subject of bargaining, the managerial right is not absolute,[17] and it will not supersede the duty to negotiate once a subject has been determined to be a mandatory subject of bargaining.

---

[15] Id.

[16] Decision No. B-33-88.

[17] See e.g. Decision No. B-4-89.

Interference with Members' Organizational Rights

The Union has not shown that the solicitation and distribution of funds to pay members' disciplinary fines have been carried out under the aegis of the employee organization. We dismiss, therefore, the Union's allegation that the amendment to Rule 25.2.2 interferes with employees' organizational rights.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that there is no proof that the unilateral imposition of an amendment to Fire Department Rule 25.2.2 prohibiting unit members from soliciting or contributing funds to pay members' disciplinary fines or assessments interferes with unit members' organizational rights; it is further

DETERMINED, that the amendment to Rule 25.2.2 is a violation of the employer's duty to bargain under Section 12-307a. of the NYCCBL; and it is therefore

ORDERED, that, with respect to Section 12-307a. of the NYCCBL, the improper practice petition herein be, and the same hereby is, granted; and it is further

DIRECTED, that the Fire Department shall cease and desist from requiring members of the Uniformed Fire Officers Association to seek the approval of the Fire Commissioner before they may solicit or contribute funds to pay members' disciplinary fines or assessments; and it is further

DIRECTED, that at the option of the City, the parties shall negotiate in good faith concerning restrictions on unit members' right to solicit or contribute funds to pay members' disciplinary fines or assessments.

DATED: New York, N.Y.
February 26, 1990

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU

MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

* City Member Dean L. Silverberg dissents from this Decision and Order without opinion.