L.854, UFOA v. City, 49 OCB 20 (BCB 1992) [Decision No. B-20-92 (IP)]

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

-between-

DECISION NO. B-20-92
DOCKET NO. BCB-1433-91

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

Petitioner,

-and-

CITY OF NEW YORK

Respondent.
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DECISION AND ORDER

On October 24, 1991, 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 alleges that the Fire Department violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] by requiring Lieutenants and Captains to satisfactorily complete a Cardiopulmonary Resuscitation Instructor Program ("CPR Program"). The City, by its Office of Labor Relations, filed a verified answer on November 25, 1991. The Union filed a verified reply on December 11, 1991. By letter dated March 26, 1992, the City, on notice to the Union, amended

[1] The Union failed to specify which subdivision of §12-306 was allegedly violated.

its answer.

Background

In its answer to the improper practice petition, the City alleged that in February of 1991, the New York State Legislature amended the General Municipal Law to require firefighters to complete a minimum of 8 hours training in CPR. The City also alleged that following the passage of this legislation, in order to comply with its mandate, the Fire Department of the City of New York decided that Lieutenants and Captains would serve as CPR instructors for the firefighters. This would require, however, that they first receive CPR training themselves. To this end, the Fire Department is currently training Lieutenants and Captains in order to enable them to obtain CPR certification.[2] According to the Union, this training entails a forty-five hour course. By letter dated March 26, 1992, the City amended its answer[3] to state that the requirement that firefighters complete 8 hours of CPR training can be found not in the General Municipal Law, but in 19 New York Code of Rules and Regulations, Section 426.6(b)(20), which was enacted in 1981. The City further noted that the amendment to the General Municipal Law referred to in its answer was never signed into law by the Governor.

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[2] The Union contends that this training program was implemented on September 27, 1991.

[3] The Trial Examiner assigned to the case contacted the Office of Labor Relations when she was unable to locate the alleged amendment to the General Municipal Law. The City amended its answer in response to this communication.

In its improper practice petition, the Union seeks an order by the Board of Collective Bargaining ("Board") directing the City to bargain "over the establishment of any such additional qualification and/or condition of employment" and to terminate the program pending the conclusion of bargaining.

Positions of the Parties

Union's Position

The Union argues that, contrary to the City's belief, its improper practice charge is not based on the City's failure to negotiate over the subject of training. Rather, it is based on the Fire Department's "requirement that all incumbent Company Officers ultimately obtain [CPR] certification." The Union alleges that its members will be required to obtain this certification "as a qualification and condition for employment and/or assignment in the Fire Department," and that failure to do so "will prejudice and/or preclude continued employment..." The Union argues that the City admits this in its answer when it states that in order to be able to train firefighters in CPR, Lieutenants and Captains must be trained themselves. According to the Union, the Officers are advised at the beginning of the training program that they are required by Fire Department Order to complete the training program, complete the course of home study, and successfully pass the certification test. The Union argues that the City cannot seriously suggest that the failure to

obtain certification will be without consequence.

Addressing the City's argument that the petition is untimely because the practice of training Lieutenants and Captains in CPR dates back to 1989, the Union argues that the current program was instituted in September of 1991. According to the Union, it was approached by the Fire Department in 1988 concerning the establishment of a "pilot program" for the training and certification of CPR instructors. The Union alleges that the parties agreed to conduct such a program, provided that the 150 participants would each receive 45 hours of administrative overtime for attendance and study time. The Union asserts that it was also agreed that the program would not be extended without further negotiation and agreement. Upon completion of the pilot program in January 1989, the Union alleges, the City evaluated it and decided not to continue it.

According to the Union, no further training took place until September of 1991 when the Fire Department unilaterally implemented the current training program. Given these circumstances, the Union argues, it is clear that the current program is distinct from the pilot program rather than a mere continuation of it. The Union argues that differences between the pilot program and the current program further support this contention: the current program does not provide for the payment of overtime, the pilot program did not require that participants ultimately receive certification, and the current training is

being performed by the American Heart Association while the American Red Cross performed the earlier training.

City's Position

The City argues that the petition should be dismissed as untimely. According to the City, while the practice of training Captains and Lieutenants in CPR dates back to 1989,[4] the improper practice petition was not filed until 1991. The City points out that, pursuant to Section 7.4 of the OCB Rules an improper practice petition must be filed within four months of the date of the act complained of. Citing this Board's decision in Decision No. B-60-88, the City argues that the four-month limitation period is to be measured from the date that the training program was implemented. The City contends that, in the absence of any argument that the four-month period should be measured from the date of some other subsequent event, the petition must be dismissed.

Alternatively, the City argues that it has no obligation to bargain over the subject of training. According to the City, this Board has held in previous decisions that training is a non-mandatory subject of bargaining. This is so, the City argues, because it has the right, reserved to it under Section 12-307b of

[4] We note that it is unclear whether the City is referring to the pilot program specifically addressed by the Union in the reply; the City's answer does not supply any detail concerning its conclusory allegation that the practice dates back to 1989.

the NYCCBL, to determine the quantity and quality of training for its employees.

The City further argues that the petition fails to allege facts sufficient as matter of law to constitute an improper practice within the meaning of the NYCCBL. The City alleges that, contrary to the Union's assertion, there is no requirement that Lieutenants and Captains be certified in CPR as a condition of their employment. The City contends that the Union has neither put forth evidence of written rules, regulations or memorandum nor alleged any specific incidents tending to establish that the training program is a condition of employment. According to the City, the petition merely contains a conclusory allegation based on speculation. Furthermore, the City argues, the Union has not alleged that it requested bargaining on the issue and was refused.

DISCUSSION

At the outset, we find that, contrary to the City's assertion, the instant improper practice petition is not untimely. Pursuant to Section 7.4 of the OCB Rules, an improper practice petition must be filed within four months of the date of the act complained of. As the City correctly maintains, the four-month limitation period is measured from the date of

implementation of the training program.[5] We are presented with two conflicting contentions regarding this issue; the City alleges that the "practice" of training Captains and Lieutenants in CPR dates back to 1989 while the Union argues that the current CPR training program, which allegedly was commenced on September 27, 1991, is separate and distinct from a pilot program conducted between 1988 and 1989. An internal inconsistency found in the City's papers supports our finding that the Union's version of the facts is more credible. In its answer, the City originally alleged that the New York State Legislature amended the General Municipal Law in February of 1991 to require firefighters to complete a minimum of 8 hours training in CPR. In paragraph 3 of its answer, the City states that "[f]ollowing the passage of the legislation, the Fire Department began implementing a program to comply with the statutory mandate..." [6] This statement could only mean that the current program was implemented sometime subsequent to February of 1991, and contradicts the City's later allegation, found in paragraph 13 of the answer, that the practice of training Captains and Lieutenants in CPR dates back to 1989. Moreover, in stark contrast to the Union's specific

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[5] Decision No. B-60-88.

[6] As previously mentioned, the City subsequently amended paragraph 2 of its answer to allege that the CPR training requirement can be found in the New York Code of Rules and Regulations, enacted in 1981, rather than in a 1991 amendment to the General Municipal Law. However, it did not simultaneously amend paragraph 3 of it answer despite the 10 year difference in enactment dates.

allegations regarding a pilot program that ended several years ago, the City's allegation that the "practice" dates back to 1989 is vague and unsupported by any further detail; the City offers no facts that either counter the Union's version of the events or persuade us that the current program is a mere continuation of a practice commenced in 1989.

Turning our attention to the merits of the petition, we have long held that, consistent with the statutory grant of management prerogative, the establishment of training procedures, in most circumstances, is a matter of management right and not a mandatory subject of bargaining.[7] An exception to this general principle may be established where training is required by the employer as a qualification for continued employment or for improvement in pay or work assignments.[8] The Union contends the instant case falls within this exception.

The Union alleges that its members will be required to complete the training program and obtain certification as a qualification for continued employment in the Fire Department. However, the Union has failed to present factual evidence to substantiate its claim. The Union alleges that the Captains and Lieutenants are advised at the beginning of the training program that they are required by Fire Department Order to complete the

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[7] Decision Nos. B-26-89; B-4-89; B-43-86; B-16-81; B-7-77; B-23-75.

[8] Decision Nos. B-26-89; B-43-86; B-2-73; B-8-68.

training program and successfully pass the certification test. However, it has failed to produce any evidence of such an order. We find that inasmuch as the City has denied the existence of such a requirement, it was incumbent upon the Union to have provided some evidence of its existence. Moreover, the Union has not alleged that any of its members ever suffered any adverse employment consequence as a result of failing to obtain certification. Mere assertion of an improper practice without factual allegations evidencing any violative activity will not sustain the requisite burden of proof placed on the charging party.[9] Accordingly, we dismiss the Union's improper practice petition without prejudice to the filing of another improper practice petition containing sufficient factual allegations to warrant our further consideration of such a claim.

[9] Decision No. B-33-80.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby,

ORDERED, that the improper practice petition filed herein by the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO, be, and the same hereby is, dismissed.

DATED: New York, New York
April 30,1992

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Jerome Joseph
MEMBER

George B. Daniels
MEMBER

Steven H. Wright
MEMBER