NYSNA v. HHC, 51 OCB 37 (BCB 1993) [Decision No. B-37-93 (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-37-93

NEW YORK STATE NURSES ASSOCIATION, DOCKET NO. BCB-1555-93

Petitioner,

-and-

NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION,

Respondent.
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DECISION AND ORDER

On February 17, 1993, the New York State Nurses Association ("the Union") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC"). The petition alleges that HHC violated Section 12-306a(4)[1] of the New York City Collective Bargaining Law ("NYCCBL")[2]. HHC filed a

[1] We note that the petition, apparently inadvertently, alleged violations of "Section 12-306(4)." HHC, in its answer, pointed this error out and stated that the petition failed to specify whether the alleged violations were of Section 12-306a(4) or c(4). In its reply the Union indicated that it was referring to Section 12-306a(4). Since Section 12-306c(4) addresses the duty of a party to supply the other party with necessary data, and the petition does not allege any facts even remotely related to a failure to provide data, it seems clear that the Union was alleging violations of Section 12-306a(4).

[2] Section 12-306a(4) of the NYCCBL provides:

a. **Improper public employer practices.** It shall be an
(continued...)

verified answer on April 2, 1993 and the Union filed a verified reply on April 14, 1993. By letter dated July 22, 1993, the Trial Examiner assigned to the case requested that the parties provide further information on the "Alternate Work Schedules" program ("AWS") referred to in the petition. In response to this request the Union filed a copy of the Alternate Work Schedule Agreement ("AWS Agreement") which the parties had negotiated in 1989.

Background

According to the Union, early in 1993 HHC unilaterally discontinued AWS at North Central Bronx Hospital, Bronx Municipal Hospital Center and Elmhurst Hospital Center. Additionally, the Union alleges, HHC refused to bargain with the Union over the impact of the discontinuance on the affected nurses. HHC's answer includes a general denial of the facts alleged in the petition.

Pursuant to the AWS Agreement, AWS went into effect on July 2, 1989. AWS, as defined by the AWS Agreement, is "[a]n arrangement of workdays and hours in which an employee fulfills her/his work commitment in a manner other than the standard five,

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(...continued)
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.

seven and one-half hour days." Participants were required to select a schedule from a list of options including three and four day work weeks comprised of from five to thirteen and one-half hour days. Each facility was required to submit a list of participants and the schedules they had chosen to HHC's Senior Director of Labor Relations for approval at least one month prior to implementation of the program. Participation in the program was on a voluntary basis and, upon four weeks written notice, an employee would be entitled to return to the standard five day schedule. The AWS Agreement is silent as to whether the employer could require an employee to return to the standard five day schedule.

As evidence of its allegations, the Union appended copies of several memos to the petition. These memos, written on the letterhead of the facilities involved and bearing dates in November of 1992, informed affected employees of the fact that AWS was being terminated, indicated the date that the termination would go into effect in each facility (January or February of 1993), and provided further instructions for establishing new schedules. The memos indicated that the new schedules would be made up solely of five, seven and one-half hour days.

Positions of the Parties

Union's Position

The Union contends that by refusing to bargain over the

impact of its unilateral discontinuance of AWS on the affected nurses, HHC has violated Section 12-306a(4) of the NYCCBL. The Union argues that the scheduling change altered the number of hours per day that employees are required to work.

HHC's Position

HHC maintains that the Union has failed to allege facts sufficient as a matter of law to constitute an improper practice. According to HHC, the petition contains only conclusory allegations; it is "devoid of any specificity, failing to allege any circumstances, dates, times, places or other facts which would substantiate these allegations of improper practice." HHC argues that this lack of specificity violates Title 61, Section 1-07(e) of the Rules of the City of New York[3] (formerly referred to as Section 7.5 of the Revised Consolidated Rules of the Office of Collective Bargaining), which requires that an improper practice petition set forth, inter alia, relevant and material documents, dates and facts. The failure to comply with this rule, HHC contends, precludes the respondent from being able to

[3] Title 61, Section 1-07(e) of the Rules of the City of New York, in relevant part, provides:

> **Petition-contents.** A petition filed pursuant to §§1-07(b), (c) or (d) shall be verified and shall contain:
>
> (3) A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts...

respond adequately to the allegations.

In any event, HHC maintains, pursuant to Section 12-307b of the NYCCBL,[4] the statutory management rights provision, it has "the sole right to determine how to deploy its personnel in order to accomplish its work objectives." HHC argues that the Union has failed to allege facts which fall within any of the exceptions to this provision.

DISCUSSION

HHC asserts that the Union's petition fails to state a valid claim of improper practice because it consists of conclusory allegations devoid of objective evidence including dates, times, places and acts. Title 61, Section 1-07(e) of the Rules of the City of New York delineates the standard for pleading a charge of

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[4] Section 12-307b of the NYCCBL provides:

> 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 government 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. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

improper practice. It is the Board's long-established policy that the OCB Rules regarding pleadings be liberally construed.[5] Where it is clear that the petition provides the respondent with sufficient information to place them on notice of the nature of the Union's claim and enable them to formulate a response, the petition is sufficient under §1-07 of the Rules.[6]

With respect to the Union's claim that HHC has unilaterally discontinued AWS at three facilities and has refused to bargain with the Union over the impact of the discontinuance on the affected nurses, the petition and the appended documents clearly satisfy the above-described standards. Moreover, the content of the HHC's answer demonstrates its awareness that the petition alleges implementation of a unilateral change in an area that the Union contends is a mandatory subject of bargaining. As an affirmative defense, the HHC raised its alleged management prerogative to deploy its personnel.

Initially, we note that HHC, through the use of a general denial, has denied all of the allegations asserted in the petition. Thus, we are presented with a record which contains, on the one hand, the Union's allegation that AWS was unilaterally terminated at North Central Bronx Hospital, Bronx Municipal Hospital Center and Elmhurst Hospital Center together with copies

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[5] Decision Nos. B-46-92; B-4-92; B-78-90; B-28-89; B-21-87.

[6] Decision Nos. B-46-92; B-63-91; B-56-88.

of memos issued by those institutions terminating the program and, on the other hand, a general denial which does not dispute the existence or authenticity of the memos. Under these circumstances, a general denial is insufficient to rebut the documentary evidence submitted by the Union. We therefore find that AWS was unilaterally terminated at the three facilities in question.

Section 12-306a(4) of the NYCCBL provides that it is an improper practice for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representative of its public employees." These matters, which include wages, hours, and working conditions, are regarded as mandatory subjects of bargaining. This does not mean, however, that every decision of a public employer which may affect a term and condition of employment automatically becomes a mandatory subject of bargaining.[7] In the absence of an express limitation set forth in the collective bargaining agreement or in a rule, regulation or written policy of the employer, the broad managerial authority to direct employees provided under Section 12-307b of the NYCCBL permits the employer to implement adjusted work assignments or schedules unilaterally as it deems necessary.

However, it is well-settled that the number of hours worked per day and the length of the work week or number of appearances

[7] Decision Nos. B-46-92; B-69-88.

required per week are mandatory subjects of bargaining.[8] It therefore follows that an employer may not unilaterally implement an adjusted work schedule that alters the number of work hours per day or days per week that employees are required to work. Clearly, the termination of AWS, which allowed employees to work fewer than five days per week and more or less than seven and one-half hours per day, and the reinstitution of the standard five day week, constituted a unilateral change in a mandatory subject of bargaining.

The public employer's duty to bargain in good faith encompasses the obligation to refrain from making unilateral changes in mandatory subjects of negotiation. Accordingly, we find that the failure of HHC to bargain before implementing a unilateral change in the AWS program constitutes an improper practice within the meaning of Section 12-306a(4) of the NYCCBL. We therefore direct HHC to negotiate over the effects resulting from this change.

[8] See, Decision Nos. B-44-92; B-4-89; B-10-81; B-24-75.

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 New York State Nurses Association, be, and the same hereby is, granted.

DIRECTED, that the New York City Health and Hospital Corporation cease and desist from terminating the Alternate Work Schedules program.

DIRECTED, that the parties negotiate in good faith concerning the scheduling of hours per day and days per week to be worked.

DATED: New York, New York
September 22, 1993

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Thomas J. Giblin
MEMBER

Steven H. Wright
MEMBER