NYSNA v. HHC, 53 OCB 10 (BCB 1994) [Decision No. B-10-94 (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-10-94

NEW YORK STATE NURSES ASSOCIATION,

DOCKET NO. BCB-1555-93

Petitioner,

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

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SUPPLEMENTAL DECISION AND CLARIFYING ORDER

On September 22, 1993, the Board of Collective Bargaining ("Board") issued Decision No. B-37-93, which granted an improper practice petition filed by the New York State Nursing Association ("the Union") against the New York City Health and Hospitals Corporation ("HHC").

On January 18, 1994, the Union filed a letter seeking clarification of the Board's determination. HHC filed a response letter on April 1, 1994.

Background and Positions of the Parties

The facts involved in Decision No. B-37-93 are straightforward. The Board found that early in 1993 HHC unilaterally discontinued the "Alternate Work Schedules" program ("AWS") at North Central Bronx Hospital, Bronx Municipal Hospital

Center and Elmhurst Hospital Center.[1] This program, established by agreement between the parties in 1989, allowed employees to work fewer than five days per week and more or less than seven and one-half hours per day. When the program was discontinued, the standard five day week was reinstated.

The Board held that the failure of HHC to bargain before implementing a unilateral change in the AWS program constituted an improper practice within the meaning of the Section 12-306a(4) of the New York City Collective Bargaining Law ("NYCCBL"). This holding was based upon the public employer's statutory duty to bargain in good faith, which encompasses the obligation to refrain from making unilateral changes in mandatory subjects of bargaining. As it is well-settled that the number of hours worked per day and the length of the work week or number of appearances required per week are mandatory subjects of bargaining, the Board determined that the termination of AWS constituted a unilateral change in a mandatory subject. Accordingly, the Board ordered HHC to cease and desist from terminating the AWS program and to negotiate in good faith concerning the scheduling of hours per day and days per week to be worked.

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[1] The Board made this finding of fact based upon the Union's submission of memos, written on the letterhead of these three facilities, which indicated the date that the termination would go into effect at each facility. In its July 1, 1994 letter responding to the Union's request for clarification, HHC asserted for the first time that at Bronx Municipal Hospital, after the memo had been distributed, but before AWS was terminated, meetings took place with the Union resulting in the continuance of the program at that facility.

Subsequent to the issuance of the Board's decision, the Union asked HHC to reinstate AWS for those nurses who had already been removed from the program. HHC refused, taking the position that the Board's order did not require it to do so. Additionally, the Union alleges, Coler Hospital continued to remove nurses from the AWS program as late as October 3, 1993.

As a result, by its January 18th letter, the Union requested that the Board clarify its order. The Union argues that, implicit in the Board's cease and desist order, is the obligation that HHC "(1) stop terminating alternate work schedules at all of its facilities and (2) reinstate the alternate work schedules in those facilities where they were terminated unilaterally."

HHC, in its reply letter, argues that a "retroactive reinstatement" of the AWS program is not implied by the Board's order. HHC contends that "it is a well-settled principle of law that judgments and decisions, be they judicial or administrative, have prospective effect only." Further, HHC argues, "if the issuer of such decision intends to impose a retroactive burden or standard, then such retroactivity must be clearly and explicitly stated." HHC maintains that nothing in Decision No. B-37-93 indicates that the Board intended for HHC to reinstate AWS where it had already been discontinued. To the contrary, HHC argues, the Board's language "is clear and unequivocal that there be collective bargaining regarding the discontinuance of the AWS programs, and the status quo at the time of the decision be

maintained during the pendency of that bargaining." HHC contends that if, as a result of bargaining, it is agreed that some AWS programs should be reinstated, the reinstatement will take place at the appropriate time.

Addressing the Union's allegation that Coler Hospital continued to remove nurses from the AWS program as late as October 3, 1993, HHC contends that, for several reasons, these instances of removal "were neither substantive nor purposeful violations of the Board's order and should be deemed to be part of the status quo in effect at the time the Board's order was issued." First, HHC asserts that the affected nurses were given notice of the termination of the program on September 15, 1993, prior to the issuance of the Board's decision. Second, HHC argues, it did not receive the decision until Wednesday, September 29, 1993. Moreover, since October 3, 1993 was the following Sunday, it would not be reasonable to expect HHC to read, analyze and circulate the Board's decision to all of its facilities within the two business days between receipt of the decision and this termination.

In any event, HHC argues, in clarifying its order the Board must consider the financial burden that would be imposed were it to direct the reinstatement of AWS in cases where it had been terminated. HHC asserts that the program was implemented during the height of the nursing shortage in the New York metropolitan area; it served as a recruitment and retention tool. According

to HHC, due to time and leave abuses by AWS participants, the program proved to be expensive and inefficient. Now that the nursing shortage has eased, HHC contends, it is no longer necessary to continue such a costly program. Moreover, HHC argues, "the administrative costs of re-establishing the program, in terms of actual costs and person hours, would be significant." Finally, HHC contends that "[i]n this time of fiscal difficulty, where the goals of every public employer and of the government as a whole are to increase productivity and efficiency and minimize expense, an order by the Board to reinstate AWS would be contrary to every principle of these policies."

Discussion

The Union in this case filed an improper practice petition in response to HHC's termination of the AWS program applicable to registered nurses ("RNs") in three of its facilities. The petition alleged that by taking this action unilaterally, HHC had violated the NYCCBL. In its order, the Board granted the improper practice petition, i.e., it found that, based on the facts presented, HHC had committed an improper practice by unilaterally terminating AWS.

Pursuant to Section 12-309a.(4) of the NYCCBL, it is the duty of the Board to remedy and prevent improper practices. Having found that an improper practice had been committed, the Board would be remiss were it not to provide a remedy. In

fulfilling its mandate under the applicable law, the Board possesses broad discretion to order a remedy which is appropriate under the facts of a given case.[2] Under the facts of the instant case, wherein the unilateral termination of the AWS program as to RNs in three HHC facilities was found to be an improper practice, the appropriate remedy was and is the reinstatement of AWS as to those RNs. This remedy was implicit in the Board's order. Contrary to the assertion of HHC, the remedy in an improper practice case is designed to make whole those affected employees who have been deprived of protected rights as a result of the commission of an improper practice. Clearly, the Board did not intend to leave the aggrieved employees without a remedy.

As for HHC's arguments concerning the financial aspects of the AWS program or its reinstatement, the Board's duty effectively to remedy violations of the NYCCBL cannot be affected by these considerations. The fact that HHC's unilateral termination of AWS may have been motivated by fiscal constraints, does not make the action any less an improper practice or any less worthy of remedy. The means by which HHC may legitimately deal with its fiscal woes does not include committing improper practices.[3]

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[2] Decision No. B-13-88.

[3] See, Association of Surrogates and Supreme Court Reporters Within the City of New York by O'Leary v. State, 79 N.Y.2d 39, 580 N.Y.S.2d 153 (1992), in which the State attempted, through legislative amendments to the State Finance Law, to

(continued...)

For these reasons, we will grant the Union's request for clarification, as set forth in the following Order:

CLARIFYING 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 New York City Health and Hospital Corporation reinstate the Alternate Work Schedules program for those RNs who have been involuntarily removed from the program, regardless of whether such action was taken before or after the issuance of Decision No. B-37-93.

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[3](...continued)
offset anticipated State budget shortfalls for the 1991-1992 fiscal year by effecting a five-day lag payroll upon employees. The Court of Appeals pointed out that under §209-a.1(e) of the Taylor Law, the State's contractual obligations under expired collective bargaining agreements continued pending negotiation of successor agreements. Thus, the Court held, the legislature's attempt to impose a "lag payroll" after the expiration of agreements amounted to unconstitutional impairment of the State's obligations. Addressing the State's arguments concerning the financial aspects of its action, the Court held that "the choice of which revenue-raising devices should be used is for others, not the courts, but the menu of alternatives does not include impairing contract rights to obtain forced loans to the State from its employees."

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

DATED: New York, New York
May 19, 1994

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Jerome E. Joseph
MEMBER

Dennison Young, Jr.
MEMBER

Anthony Coles
MEMBER