L.854, UFA v. City, 57 OCB 25 (BCB 1996) [Decision No. B-25-96 (IP)]

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

- between -

Uniformed Fire Officers Association
Local 854, IAFF, AFL-CIO,

Petitioner,

Decision No. B-25-96
Docket No. BCB-1812-96

- and -

The City of New York,

Respondent.
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DECISION AND ORDER

On February 2, 1996, the Uniformed Fire Officers Association ("Union") filed a verified improper practice petition. It alleged that the New York City Fire Department ("Department") violated the New York City Collective Bargaining Law ("NYCCBL")[1] by refusing to bargain over the implementation of a revised substance abuse policy. As a remedy, it requests that the Board of Collective Bargaining order the Department to rescind the substance abuse policy and bargain with the Union.

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[1] Section 12-306 of the NYCCBL provides, in relevant part:

a. Improper public employer practices. It shall be an 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.

On February 22, 1996, the Union petitioned for permission to seek an injunction against implementation of the Department's substance abuse policy. The petition for injunctive relief was dismissed by the Board in Decision No. B-10-96 (INJ).

The Department, by the New York City Office of Labor Relations, requested and was granted an extension of time in which to file its answer. The Department's answer was filed on March 14, 1996. The Union requested and was granted an extension of time in which to file a reply, which was filed on April 3, 1996. By letter dated April 5, 1996, the Department requested an opportunity to address issues raised in the Union's reply and stated its position in response. By letter dated April 10, 1996, the Union asked that the Office of Collective Bargaining reject what it characterized as the Department's sur-reply.

Background

The Union is the certified bargaining representative for employees of the Department in the titles of Lieutenant, Captain, Battalion Chief, Deputy Chief, Supervising Fire Marshal and Administrative Fire Marshal.[2] For a number of years, the Department has maintained a substance abuse policy, set forth in

[2]The Union does not contest those parts of the substance abuse policy which concern only Fire Marshals, since it does not represent that title. It also states that random drug testing of its members is not in dispute here.

various Department "circulars" which have been revised from time to time.

In a letter dated January 18, 1996, to the President of the Union, the Department's Director of Labor Relations stated:

> Enclosed for your review and comments is a revised copy of PA/ID 1/84R, Subject: Substance Abuse and Other Situational Stress: Treatment Policy and a revised copy of AUC 202R, Subject: Substance Policy: Drugs/Alcohol.
>
> We expect to publish this document on or about February 1, 1996. If you have any questions or comments please refer them to Donald J. Burns, Chief of Operations....

The Union's attorney responded in a letter to the Department's Deputy Commissioner for Legal Affairs, dated January 30, 1996. He stated that the Union had received a copy of the Department's letter on January 23rd, that the President of the Union was out of the country, and that they had, several times, requested that implementation of the policy be postponed until the President returned and the Union was able to respond fully. In addition, he asserted that the Department was implementing new disciplinary standards, which could not be imposed unilaterally by the employer. The letter continues, "the UFOA hereby demands that the City bargain with it over the City's proposal to implement new or different penalties for violations of the substance abuse policy" and requests that the Department delay implementation of the policy "pending the collective bargaining mandated by

law."[3] On February 1, 1996, the Department implemented AUC 202R, entitled "Substance Policy: Drugs/Alcohol," which applies to employees in titles represented by the Union.

Positions of the Parties

Union's Position

According to the Union, the revised substance abuse policy specifies penalties for its violation, and procedures for imposition of discipline, which differ from those of the previous policy. It claims that these include the penalty of discharge for a first offense or for off-duty conduct.

The Union asserts that determination of disciplinary standards, penalties and procedures is a mandatory subject of bargaining and that the NYCCBL prohibits their implementation without bargaining. Dismissing the Department's argument that bargaining in this case is prohibited, it maintains that City of New York v. MacDonald[4] does not prohibit all bargaining about disciplinary procedures. The Union argues that Civil Service Law

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[3]The Union's letter mentions a recent telephone conversation between its attorney and the Deputy Commissioner for Legal Affairs concerning the proposed substance abuse policy. The Union's attorney also states that he is "writing to supplement the letter from Chief Travers and to further set forth the position of the UFOA" regarding the policy. From this, we may surmise that the Union and the Department had some communication regarding the substance abuse policy between January 23rd and January 30th.

[4]N.Y. Co. Supreme Court 4/14/92, modified, 201 A.D.2d 258, 607 N.Y.S.2d 24, 145 LRRM 2894 (1st Dept 1994), leave to appeal den'd, 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994).

§76(4) expressly allows the limited disciplinary measures identified therein to be "supplemented, modified or replaced by" collective bargaining agreements between a municipal employer and employee organization.[5] It cites Auburn Police Local 195, Council 82, AFSCME, AFL-CIO v. Helsby ("Helsby")[6] for the proposition that disciplinary procedures are not, inherently, prohibited subjects of collective bargaining, and that there is no prohibition against bargaining over discipline except where it would be contrary to local law.

The Union maintains that the Department's letter of January 18, 1996 did not "invite bargaining" but, rather, asked for review and comment. The Union asserts that it demanded bargaining on this issue in conversations with the Department on January 29, 1996 and in its letter of January 30, 1996. In addition, it argues that the constitutionality of drug testing is not at issue here, since the policy does not impose random testing on any member of its bargaining unit.

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[5]Section 76(4) of the Civil Service Law provides, in relevant part:

Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. . . .

[6]91 Misc.2d 909 (Sup.Ct. Albany Co. 1977), aff'd 62 A.D.2d 12 (3d Dept. 1978), aff'd 46 N.Y.2d 1034 (1979).

City's Position

The Department asserts that disciplinary standards, penalties and procedures, where provided for by local law, are not mandatory subjects of bargaining. Rather, it maintains, they are managerial rights, explicitly reserved by §12-307b. of the NYCCBL.

The Department argues that "the disciplinary procedures to be followed when discipline is taken" according to the new policy, are not different from those specified in Article XVII of the current collective bargaining agreement, §75 of the Civil Service Law and §15-113 et seq. of the New York Administrative Code.[7]

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[7]Article XVII of the collective bargaining agreement is entitled "Individual Rights." It sets forth basic due process guidelines, including reasonable times and pay rates for interrogations, trials, interviews and hearings (Section 1); notification of subject matter of a hearing, trial, interrogation or interview, and whether or not the employee is a suspect (Section 2); ten days' notice before trial (Section 3); notice of identity of accuser and reasonable guidelines for questioning (Section 4); a warning of rights similar to a "Miranda warning" and the right to representation by the union (Section 5); failure to answer relevant questions may result in disciplinary action, including dismissal (Section 7); self-incriminating statements made during the course of an investigation may not be used against the employee (Section 8); if an employee is found not guilty, the record of the proceeding does not become part of his or her file (Section 9); if the employer does not comply with the terms of this article, the proceeding will not be prejudicial to the employee (Section 10); the employee has the right to have a personal physician consult with the Department about examinations and interviews (Section 11); compensation for employees who are subpoenaed to testify before an administrative tribunal.

Section 6 of Article XVII provides:

(continued...)

[7](...continued)

A. An employee shall not be questioned by the Employer on personal behavior while off duty and out of uniform except that the Employer shall continue to have the right to question an employee about personal behavior while off duty and out of uniform in the following areas:

i. matters pertaining to official department routine or business;
ii. extra departmental employment;
iii. conflict of interest;
iv. injuries or illnesses;
v. residency;
vi. performance as volunteer firefighter;
vii. loss or improper use of department property.

B. If an employee alleges a breach of subdivision (a) of this Section 6, that employee has the right to a hearing and determination by the Impartial Chair within 24 hours following the claimed breach. To exercise this right, the employee must request such arbitration at the time when an official of the Employer asks questions in an area which is disputed under subdivision (a) of this section. If the employee requests such arbitration, that employee shall not be required to answer such questions until the arbitrator makes the award.

Section 75 of the Civil Service Law addresses removals and other disciplinary action. Because of its length, we will refer to a specific part of the provision as it becomes necessary.

Chapter I, Section 15 of the New York Administrative Code (Fire Department") provides, in relevant part:

§ 15-113 **Discipline of members; removal from force.** The commissioner shall have power, in his or her discretion on conviction of a member of the force of any legal offense or neglect of duty or disobedience of orders or incapacity, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer of member, or other breach of discipline, to punish the offending party by reprimand, forfeiture and withholding of pay for a specified time, or dismis-sal from the force; but not more than ten days' pay shall be for-feited and withheld for any offense. Officers and members of the uniformed force shall be removable only after written charges shall have been preferred against them, and after the charges shall have been publicly examined into, upon such

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The Department denies that the Union informed it of its position on January 29th; rather, it claims, the Department was first told of the Union's position by letter on January 30th. The Department admits that the Union demanded bargaining, but claims that the demand was in response to the Department's request for comments and questions, and that the Union refused to offer a comprehensive response to the Department's request.

The Department also admits that the Union demanded that the Department defer implementation of the penalty and "disciplinary procedure" provisions until the parties entered into collective bargaining. The Department maintains that where a disciplinary procedure is provided by local law, it is not a mandatory subject of negotiation.[8]

The Department admits that it issued a "consolidated" substance abuse policy on February 1, 1996. It maintains that

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[7](...continued)
reasonable notice of not less than forty-eight hours to the person charged, and in such manner of examination as the rules and regulations of the commis-sioner may prescribe. The examination into such charges and trial shall be conducted by the commissioner, a deputy commissioner or other person designated by the commissioner in writing for that purpose; but no decision shall be final or be enforced until ap-proved by the commissioner. The rules and regulations for the uniformed force of the department, as established from time to time by the commissioner, shall be printed, published and circulated among the officers and members of such department.

§15-114 ("resignations and absences") and 15-115 ("rehearing of charges; reinstatement of members of department"), although cited by the City, are not relevant to the instant proceeding.

[8]City of New York v. Malcolm D. MacDonald, footnote 5, supra.

all of the provisions in the consolidated policy were included in previous drug and alcohol abuse policies, and that the policy issued on February 1st was merely a consolidation and restatement of the Department's earlier policies.

The Department cites Decision Nos. B-14-92 and B-15-92 for the proposition that it did not refuse to bargain in good faith because it had merely announced its intention to exercise its statutory prerogative in a certain way. Furthermore, it cites Decision No. B-21-81 for the proposition that by announcing the proposed changes to the Union, it had displayed a willingness to discuss and resolve the Union's concerns, and that the Union then refused to bargain. The Department also contends that there has been no failure to bargain because random drug-testing of Fire Marshals is constitutional and, therefore, is not a mandatory subject of bargaining.

Discussion

At the outset, we remind the parties that Title 61 of the Rules of the City of New York contains no provision for submitting sur-replies, unless special circumstances warrant accepting them.[9] Such circumstances do not exist here. Accordingly, we have not considered the Department's submission in reaching our decision.

[9]Decision Nos. B-16-90; B-16-83.

According to the Union, the revised substance abuse policy specifies penalties for its violation, and procedures for imposition of discipline, which differ from those of the previous policy. It claims that these include the penalty of discharge for a first offense or for off-duty conduct. The Department counters that the policy issued on February 1st is merely a consolidation and restatement of the Department's earlier policies.

We find that there is a substantial difference between the earlier policies and the policy in dispute. Earlier policies provide that "appropriate disciplinary measures" will be taken, but this appears to apply only to officers on duty who fail to enforce the policy by identifying substance abusers, and penalties are not specified. In the newest Department policy, both members on duty and those who are off-duty and "present during a violation of this circular" are responsible for reporting the violation. If a member does not report a violation under these circumstances, he or she could be subject to disciplinary action.

A previous Department memo stated that "a member will not lose his job for having a personal problem." The new penalty provisions make it clear that this is no longer the case. The penalty for a second offense of being intoxicated while on duty is now termination, as is the penalty for a first offense of "illegal drug positive/refusal to provide specimen," for conviction in a drug-related arrest, and for a third offense of a "DWI/DWAI" conviction. Having found that the substance abuse

policy in dispute contains new disciplinary predicates and penalty provisions, however, we also find that these new provisions may not be submitted to collective bargaining.

The Union cites Auburn and Binghamton Civil Service Forum v. City of Binghamton[10] for the proposition that determination of disciplinary standards is a mandatory subject of bargaining which cannot be imposed unilaterally by the Department. It is true that these cases established that disciplinary procedures are not per se prohibited subjects. Under the circumstances here, however, discipline may not be considered a mandatory subject of bargaining because that subject is reserved to the Department by statute.

In City of New York v. MacDonald, the Board issued a decision on the Department's petition seeking a determination as to whether two of the bargaining demands presented by the Patrolmen's Benevolent Association were mandatory subjects of bargaining. Demand No. 22 sought to establish arbitral review of disciplinary actions taken against tenured officers. The court found that:

> a reading of the applicable statutes and section 434 of the New York City Charter discloses a legislative intent and public policy to leave the disciplining of police officers, including the right to determine guilt or innocence of breach of disciplinary rules and the penalty to be imposed upon conviction, to the discretion of the Police Commissioner, subject, of course, to review by the courts pursuant to Article 78. Any attempt to impose a supervening arbitration process

[10]44 N.Y.2d 23, 403 N.Y.S.2d 482, 374 N.E.2d 380 (1978).

> upon the Police Commissioner, as suggested by BCB, would repeal or modify this discretion to determine and impose discipline in violation of Civil Service Law §76(4).[11]

The court referred to CSL §76(4) to emphasize that, while the disciplinary procedures under §§75 and 76 of that law may be supplemented, modified or replaced by collectively bargained agreements, no such provisions may be construed to repeal or modify any general, special or local law relating to the discipline of public employees.

In Town of Greenburgh,[12] an impasse panel awarded a police union the right to have disciplinary charges heard by an arbitrator. The court affirmed a lower court's decision to vacate that portion of the award, finding that the panel exceeded its authority because a local law prevented collective bargaining on this issue and because the local law governed discipline of police officers. It reasoned:

> [u]nder the Taylor Law . . . discipline is a permissible subject of negotiation between public employers and employee associations because it is a term or condition of employment and subdivision 4 of section 76 of the Civil Service Law permits collective bargaining modification of the statutory procedures governing discipline . . . The Taylor Law does not apply, however, to disciplinary procedures involving members of town police departments in Westchester County because of the provisions of the Westchester County Police Act. Subdivision 4 of section 76 of the Civil Service Law, permitting collective bargaining as to disciplinary

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[11]City v. MacDonald, footnote 5, supra, at 25.

[12]Town of Greenburgh v. Association of the Town of Greenburgh, Inc., 94 A.D.2d 771, 462 N.Y.S.2d 718 (2d Dept. 1983).

> procedures, expressly provides that sections 75 and 76 are not to be construed to repeal or modify any general, special or local law relating to the removal or suspension of employees and the Westchester County Police Act is such a special act.
>
> The Westchester County Police Act provides that disciplinary matters involving members of town police departments must be heard by the town board or the board of police commissioners and that the obligation to conduct such hearings cannot be delegated. The special statute also gives the town board the power to suspend members of the police department without pay pending the trial of the charges against them. Notwithstanding any contrary provisions in the Civil Service Law, then, a Westchester town board's authority to suspend an officer without pay and its obligation . . . to try disciplinary charges are not subject to collective bargaining. [citations omitted]

The same result was reached, in similar circumstances, in Rockland County PBA v. Town of Clarkstown.[13]

It is clear that the courts have interpreted CSL §76(4) to reserve to a local executive as much of the disciplinary process as is granted to her or him by local law. In the instant case, §15-113 of the Administrative Code gives the Fire Commissioner the power to punish members of the bargaining unit "by reprimand, forfeiture and withholding of pay for a specified time, or dismissal from the force" upon conviction of enumerated offenses, the list of which seemingly could include any imaginable offense. It also reserves to the Commissioner control of presenting written charges and conducting disciplinary hearings. For that reason, we must find that disciplinary penalties, and procedures involving charges and hearings, are subjects reserved to the Fire

[13]149 A.D.2d 516, 539 N.Y.S.2d 993 (2d Dept. 1989)

Commissioner by the Administrative Code. We have also found in the past that "the decision to take disciplinary action and the preliminary investigation of an employee which may result in a decision to take such action are matters of management prerogative under §12-307b. of the NYCCBL."[14] Our determination here, however, does not preclude an employee or the Union from challenging the application of a disciplinary predicate or the imposition of a penalty, on a case by case basis, in an appropriate administrative forum.

Accordingly, the instant improper practice petition is dismissed.

[14]Decision No. B-41-87 at 9, citing Decision Nos. B-37-86, B-16-81, B-10-75.

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 docketed as BCB-1812-96 be, and the same hereby is, dismissed.

Dated: New York, New York
July 31, 1996

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Richard Wilsker
MEMBER

Saul G. Kramer
MEMBER