L. 1182, CWA v. DOS, 61 OCB 4 (BCB 1998) [Decision No. B-4-98 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
-between-	:	
LOCAL 1182, COMMUNICATIONS WORKERS of AMERICA, Petitioner,	:	DECISION NO. B-4-98 DOCKET NO. BCB-1832-96
-and-	:	
NEW YORK CITY DEPARTMENT OF SANITATION, Respondent.	:	

DECISION AND ORDER

On May 17, 1996, Local 1182, Communication Workers of America ("Union") filed an improper practice petition against the New York City Department of Sanitation ("DOS"). The Union asserts violations of New York City Collective Bargaining Law ("NYCCBL") §§12-305[1] and 12-306,[2] "including, but not limited to, section 12-306(a)(4) and 12-306(c) of that law." The

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[1] NYCCBL §12-305 states, in pertinent part:

> **Rights of public employees and certified employee organizations.** Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

[2] NYCCBL §12-306 states, in pertinent part:

> **Improper practices; good faith bargaining.** a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

DOS, through the New York City Office of Labor Relations, filed an answer on July 24, 1996.

The Union filed its reply on August 1, 1996.

BACKGROUND

On April 14, 1996, Pansy Mullings, Assistant Commissioner of Enforcement at the DOS, issued "Command Order 96-029E-Working Charts" ("Order"), notifying Sanitation Enforcement Agents ("SEAs") that, instead of their normal five-day/40-hour-week,

> Effective April 14, 1996, all enforcement personnel will be working mandatory charts until further notice. We will be

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> (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.
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> c. Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
> (1) to approach the negotiations with a sincere resolve to reach an agreement;
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;
> (5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

assigning additional personnel into the 15 dirtiest districts.

At the time the Order was implemented, Mullings told Ruth Thomas, Local 1182 Sanitation Chief Delegate, that SEAs would be required to work a six-day-week until the "end of the fiscal year and possibly until next winter." The DOS submits that the mandatory assignments of overtime ceased on July 6, 1996, and further submits that, pursuant to the July 1, 1990 - June 30, 1992 City-wide Agreement ("Agreement"), Article IV, §3(a)[3], all SEAs who worked the extra day received overtime payment of one and one half times the employee's normal rate of pay.[4]

POSITIONS OF THE PARTIES

Union's Position

The Union states that, as a result of Command Order 96-029E, the DOS ordered SEAs to perform mandatory work charts of six days per week, resulting in the loss of one of their two days off per week. The Union claims that, by virtue of that Order, the DOS unilaterally changed the number of hours per week that SEAs were required to work. The Union asserts that the Order thereby violated NYCCBL §§12-305 and 12-306.

The Union seeks a remedy to: i) make whole any SEA for damages resulting from the DOS's conduct, including, but not be limited to, compensation time for all days worked in excess of the

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[3] Article IV, §3(a) of the City-wide Agreement provides:

> Ordered involuntary overtime which results in an employee working in excess of forty (40) hours in any calendar week shall be compensated in cash at time and one half (1-1/2 times).

[4] The Union submitted a general denial to these assertions.

normal five-day-week, in addition to overtime; ii) an order to the DOS to cease and desist from violating the NYCCBL with regard to changing the work chart; iii) posting a notice to communicate the provisions of an order to bargain; and iv) attorneys fees.

DOS's Position

The DOS claims that it has not unilaterally changed the SEA's work chart, and that the six-day-week was merely an exercise of its managerial right to assign overtime pursuant to NYCCBL §12-307(b).[5] Specifically, the DOS states that the assignment of overtime is directly related to its statutory right to "determine the standard of services to be offered" and to "determine the methods, means and personnel by which government operations are to be conducted ...."[6]

The DOS acknowledges that, had it changed the total hours to be worked in a day or a week, the issue might be bargainable. However, the DOS states that there has been no allegation that

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[5] NYCCBL §12-307(b) states in pertinent part, that:

> 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 governmental 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.

[6] The DOS cites Decision Nos. B-1-95; B-34-93; B-59-89; B-29-87, *citing* B-20-87, B-17-87, B-35-86, B-23-86; ; B-6-74.

regularly assigned hours worked within the chart have changed; SEAs continue to work the same amount of regularly assigned hours per week, absent the overtime. Moreover, the DOS points out that the six-day-week schedule was discontinued as of July 6, 1996. Since SEAs have stopped working the mandatory overtime, any alleged mandatory bargaining order is no longer necessary, and the petition should therefore be dismissed.

The DOS also asserts that, while the rate to be paid for overtime is bargainable, the decision whether and when to assign overtime is not. The DOS further claims that it is not required to renegotiate the issue of overtime pay which had been fully bargained over during City-wide negotiations. Moreover, argues the DOS, since the issue involves the assignment of overtime, a management right,[7] the petition should be dismissed.

DISCUSSION

The allegations in the petition raise the issue of whether the Respondent has unilaterally changed the hours of work of SEAs by requiring them to work a six-day-week, thereby eliminating one of their days off. The DOS argues that the imposition of the six-day-week was an exercise of its managerial right to assign overtime pursuant to NYCCBL §12-307(b), directly related to its right to "determine the standard of services to be offered" and to "determine the methods, means and personnel by which government operations are to be conducted ...." We agree.

[7] The DOS cites Decision No. B-18-75.

Public employers and employee organizations have a statutory duty, under NYCCBL §12-307(a), to bargain on all matters concerning wages, hours and working conditions: mandatory subjects of bargaining. A public employer who refuses to bargain in good faith on these matters violates NYCCBL §12-306(a)(4).[8] However, this does not mean that every decision by a public employer that affects a term and condition of employment automatically becomes a mandatory subject of negotiations. On the contrary, NYCCBL §12-307(b) expressly reserves to management the authority to determine the standards of service to be offered by city agencies, as well as the methods, means and personnel by which governmental operations are to be conducted.[9] Under this statutory scheme, we have held that decisions regarding the determination of work charts[10] as well as when and how much overtime is to be authorized or ordered, fall within the realm reserved to the DOS by NYCCBL §12-307(b) and are therefore outside the scope of the DOS's obligation to bargain.[11] While the NYCCBL recognizes that a decision made by an employer in the exercise of its managerial prerogative may give rise to issues within the scope of bargaining concerning the practical impact such decision may have, no

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[8] See, Decision Nos. B-16-96; B-36-93; B-22-92.

[9] *See*, Decision No. B-36-93.

[10] Decision No. B-45-92.

[11] Decision Nos. B-34-93; B-29-87; B-2-73; B-4-69; B-11-68. *See also,* Police Association of the City of Mount Vernon v. City of Mount Vernon, 13 PERB 3071 (1980) (demand that posted work schedules not be altered except in emergencies seen as interfering with management rights and nonmandatory); Orange County Community College Faculty Association v. Orange County Community College and County of Orange, 9 PERB ¶3068 (1976) (demand the employees not be required to work weekends or evenings seen as nonmandatory).

such allegation was pled in this matter.

In the instant matter, the DOS made the determination that it was necessary to require that SEAs work a six-day-week in order to clean up the 15 dirtiest districts of the city. This schedule was imposed for less than three months. There is no dispute that compensation of SEAs for time spent on this project appears to be in compliance with the overtime provisions of the Agreement between the parties, and the standard work charts, apart from the addition of overtime, were unchanged. We therefore do not find this to be a change in the wages, hours and working conditions of SEAs, giving rise to a mandatory issue of bargaining, or otherwise resulting in an improper practice under the NYCCBL.

Accordingly, the instant improper practice petition is dismissed in its entirety.

ORDER

Decision No. B-4-98
Docket No. BCB-1832-96

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-1832-96 be, and the same hereby is, dismissed.

DATED: February 19, 1998
New York, N. Y.

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

Thomas J. Giblin
MEMBER

Robert H. Bogucki
MEMBER

Saul G. Kramer
MEMBER