L. 1182, CWA v. NYPD & City, 61 OCB 47 (BCB 1998) [Decision No. B-47-98 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
	:	
-between-	:	
	:	
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1182,	:	
	:	Decision No. B-47-98
Petitioner,	:	Docket No. BCB-1891-97
	:	
-and-	:	
	:	
NEW YORK CITY POLICE DEPARTMENT and the CITY OF NEW YORK,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On January 30, 1997, the Communications Workers of America, Local 1182 ("Union" or "Petitioner"), filed a verified improper practice petition against the New York City Police Department ("NYPD") and the City of New York (hereinafter referred to collectively as "City" or "Respondent"). The petition alleges that the NYPD violated §12-306 of the New York City Collective Bargaining Law ("NYCCBL") when it unilaterally changed its procedures concerning drug testing of its employees. The parties requested that the matter be placed on inactive status, pending settlement, until the Union requested that it be placed on back on active status in March of 1998. The City filed their answer on May 7, 1998 and the Union filed their reply on May 18, 1998.

BACKGROUND

On January 31, 1995, John Beirne, then Inspector and Commanding Officer of the NYPD

Office of Labor Relations, sent Stanley Hill, the Executive Director of the city-wide representative, District Council 37, a letter stating that the Department was going to add hair testing to the "for cause" drug screening currently in use for uniform and civilian members. The proposed Interim Order revising the procedures was attached. On May 31, 1995, Interim Order 88 ("IO 88") was issued. It states, "Effective immediately, the Department will require that a member of the service, required to comply with the provisions of Patrol Guide procedure 118-18, 'Administration of Drug Screening Tests for Cause' by supplying a urine sample, will also be required to supply hair samples." With respect to the process by which an employee could request a retest of a positive hair sample, the Order provides that, upon request of the employee, the original sample could be retested independently at the expense of the affected member of the service. On July 25, 1995, Barbara Ingram-Edmonds, Assistant Director of Research and Negotiations sent a letter to Michael Davies, the Assistant Commissioner of the Office of Labor Relations ("OLR") confirming a bargaining session regarding "Hair Sampling Drug Testing 'For Cause'" on August 2, 1995.

On August 6, 1996, Traffic Enforcement Agents were functionally transferred from the Department of Transportation to the NYPD. On October 2, 1996, Interim Order 88-1 ("IO 88-1") was issued. The subject listed is "revision of Patrol Guide Procedure 118-18, 'Administration of Drug Screening Tests for Cause.'" With respect to the process by which an employee could request a retest of a positive hair sample, § 2(a) of IO 88-1 provided that, upon request of the employee, the sample of hair will be forwarded to the original testing facility for comparison with the initial sample and retested for drugs. (Emphasis added).

On February 3, 1997, the Petitioner filed the instant improper practice petition, in which it

alleges that the NYPD unilaterally changed drug-testing procedures applicable to its members by "not allowing employees to have hair samples taken for drug testing retested at an independent laboratory different than the one used by the Police Department," and that this violated §§12-306(a)(1) and (4) and 12-306(c) of the NYCCBL.[1] As a remedy, the Union requests that all agents affected by the change in drug testing procedures be reinstated with full back pay and benefits, plus interest, the issuance of an order to cease and desist from violating the NYCCBL in the manner described and the posting of a notice communicating the provisions of the order to bargaining unit employees and attorneys fees.

On August 21, 1997, the NYPD issued Interim Order 60 ("IO 60"), revoking Interim Orders

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

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in § 12-305 of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public organization;

(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 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.

No. 88 and 88-1 and substituting new procedures set forth in IO 60. IO 60, in the section entitled "Additional Data" states, in relevant part, "[w]hen retesting hair, the third sample of hair stored at the Medical Division will be forwarded to a lab of the member's choice." It then continues, "[t]he lab must be certified to perform drug testing by New York State, the U.S. Department of Health and Human Services or the College of American Pathologists."

POSITIONS OF THE PARTIES

Petitioner's Position

The Union alleges that the unilateral change in Police Department drug testing procedures applicable to its employees, as evident in Interim Order No. 88-1, is a unilateral change in the terms and conditions of employment as it removes from the officer the right to have hair samples retested at a laboratory of their own choosing. Thus, the Union contends that it is a mandatory subject of bargaining. It alleges that, even though IO 60 revokes IO 88-1, IO 60 still does not allow employees to have hair samples retested at a laboratory of their own choosing, as was permitted in IO 88, but limits and defines those laboratories that employees are allowed to use. As such, the Union argues that the NYPD's unilateral action in issuing IO 60 constitutes a continuing and further improper practice.

Respondent's Position

The City contends that the instant proceeding is moot because IO 60 provides for the retesting of hair samples at an independent laboratory different from the one used by the NYPD, and thus, the condition complained of in the improper practice petition has been cured.

It also contends that Petitioner has failed to allege facts sufficient to establish an employer

improper practice as defined by NYCCBL §12-306(a)(1). It states that §12-306(a)(1)of the NYCCBL proscribes the interference with, restraint or coercion of public employees in the exercise of their §12-305 rights.[2] The City contends that in order to state a violation of §12-306(a)(1) of the NYCCBL, the Petitioner must allege that the Respondent's action was taken against Petitioner for the purpose of interfering with, diminishing, or otherwise impairing the exercise of Petitioner's rights under §12-305.[3] The City argues that Petitioner has failed to allege any facts which could be construed as claiming that Respondent has in any way interfered with any right guaranteed in §12-305, as there is no allegation of management interference, restraint or coercion in the Petitioner's right to self-organize, form, join or assist a public employee organization.

The City also argues that Petitioner's allegation of a violation of NYCCBL §12-306(c) does not state an improper practice as §12-306(c) merely provides the definition of "good faith bargaining" for the purposes of the NYCCBL. The City states that the allegation is analogous to those situations in which the section alleged to have been violated is a part of the grievance procedure that merely provides the definition of a grievance. It argues that in such cases, the Board has long held that the mere definitional clause does not create substantive rights or furnish an independent basis for a grievance.[4]

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[2] §12-305 is entitled: Rights of public employees and certified employee organizations.

[3] The City cites Decision No. B-29-92.

[4] The City cites Decision Nos. B-4-94; B-27-89; B-28-82.

DISCUSSION

Public employers and employee organizations have a statutory duty, under § 12-307(a) of the NYCCBL, to bargain on all matters concerning wages, hours and working conditions, *i.e.*, mandatory subjects of bargaining. Section 12-306(a)(4) of the NYCCBL makes it an improper practice for a public employer to refuse to bargain in good faith on such matters.[5] A similar prohibition against an employer's refusal to bargain with the certified bargaining representative can be found in §209-a.1(d) of the Taylor Law. It has been held, under both statutes, that a unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith, and, therefore, an improper practice under the applicable statute.[6]

The Union alleges in its petition that the promulgation of IO 88-1, titled "Revision of Patrol Guide Procedure 118-18, 'Administration of Drug Screening Tests For Cause,'" constitutes a unilateral change in terms and conditions of employment since the document sets forth new testing procedures. Thus, the issue presented by the Union's petition is not whether the decision to test is a mandatory subject of bargaining. Rather, the issue is whether the procedures used to implement

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[5] We decline to discuss the City's final "definitional clause" argument regarding § 12-306(c), as it has long been established that a violation of an obligation under § 12-306(c) would constitute a breach of the duty to bargain under § 12-306(a). *See e.g.,* Decision No. B-29-84. We find the City's attempt to have the argument, which generally applies to contracts in an arbitrability matter, apply to this situation, to be, at best, tenuous.

[6] Decision Nos. B-36-93; B-22-92; B-25-85; and B-6-82. *See also: Village of Rockville Center*, 18 PERB ¶3082 (1985); *City of Batavia*, 16 PERB ¶3092 (1983); and *Board of Education, City of Buffalo*, 6 PERB ¶3051 (1973).

The duty to negotiate a mandatory subject includes the duty to negotiate until agreement is reached or the impasse procedures are exhausted, and to submit to the impasse procedures set forth in the statute; the City may not unilaterally implement a change in a mandatory subject of bargaining before bargaining on the subject has been exhausted. *See*, Decision No. B-63-91.

that decision and the consequences of testing are mandatory subjects of bargaining.

The Public Employment Relations Board has examined this issue and has held that the procedures and consequences associated with management's decision to implement a drug testing policy are mandatorily bargainable. *Nassau County Police Benevolent Association v. County of Nassau*, 27 PERB ¶3054 (1994); *Utica Professional Firefighters Association v. City of Utica*, 25 PERB ¶4641 (1992); *see*, *Uniformed Firefighters of Cohoes v. City of Cohoes*, 25 PERB ¶3042 (1992). This Board reached the same conclusion, in reliance on the PERB analysis, in Decision No. B-16-96.

Turning to the Union's contention that the promulgation of IO 88-1 constitutes a unilateral change in terms and conditions of employment because they set forth new testing procedures, we note that, pursuant to Decision No. B-16-96 and the PERB case cited therein, choice of laboratory is explicitly named as a mandatory subject of bargaining. IO 88-1 limits the retesting of the sample to police labs, where IO 88 had previously guaranteed the right of the employee to have the sample tested at an independent lab of their choosing, and the City produces no persuasive evidence that the Union was consulted as to the promulgation of IO 88-1. The City only produces evidence as to possible bargaining over IO 88, as evidenced in the letter of January 31, 1995. The letter confirming bargaining over the subject matter "Hair sampling drug testing 'for cause'" dated July 25, 1995, is not conclusive evidence that bargaining actually occurred over the disputed provisions in the instant matter, as the subject listed could cover anything regarding hair sampling drug testing "for cause." Additionally, there is such a large gap of time between the bargaining session in August, 1995 and the issuance of IO 88-1 in October, 1996 that it tends to cast doubt on any assertions that the two

were in any way connected. For these reasons, we find that this was a unilateral change which constitutes an improper practice.

In response to the City's claims that the Union's claim is moot because IO 60 repealed IO 88-1 and granted to the Union the right to have the sample unilaterally tested, the Union contends that the NYPD's unilateral action in issuing IO 60 constitutes a continuing and further improper practice because it adds the requirement that the lab be approved by New York State, the U.S. Dept. of Health and Human Services or the College of American Pathologists. We agree, as we note that neither IO 88 nor IO 88-1 had such a limiting requirement, and it also constitutes a change in drug testing procedures. Accordingly, we hold that the instant matter is not moot, and that the unilateral promulgation of IO 60 constitutes a continuing violation of the NYCCBL.

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 petition docketed as BCB-1891-97 be, and the same hereby is, GRANTED, therefore it is

DIRECTED, that the parties in the case docketed as BCB-1891-97 continue to bargain and exchange information so that they may reach a solution whereby the needs of both parties may be accommodated; and it is further,

DIRECTED, that the parties report to the Board on the outcome of their negotiations in this matter at our November, 1998 meeting; and it is further,

ORDERED, that the Board will retain jurisdiction in this case in the event that mediation or impasse resolution pursuant to §12-311 of the NYCCBL may be necessary.

DATED: New York, New York
October 26, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER