Doctors Council, SEIU v. HHC, 67 OCB 21 (BCB 2001) [Decision No. B-21-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DOCTORS COUNCIL, S.E.I.U., AFL-CIO,

Petitioner,

Decision No. B-21-2001
Docket No. BCB-2164-00

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

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DECISION AND ORDER

On November 17, 2000, Doctors Council ("Petitioner" or "Union") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("Respondent" or "HHC"), alleging that Respondent unilaterally raised the compensation of Dr. Anthony DiBartolo by changing his status from full-time *per annum* to part-time *per session*.[1] HHC argues that it need not bargain over a change in status for every employee who is a member of the bargaining unit and whose wages are in accord with the collective bargaining agreement ("CBA") between the parties. This Board finds that Petitioner has failed to allege sufficient facts to demonstrate that HHC was required to bargain over the change in DiBartolo's status, which resulted in a change in the rate of his compensation. We therefore dismiss the instant petition.

[1] Petitioner claims that the HHC's actions violated Section 12-306a(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

BACKGROUND

Dr. Anthony DiBartolo, a dentist working at Family Health Services, started work with HHC in January 1996 as a part-time employee. (Answer, Exhibit 1.)[2] Throughout his tenure at HHC, his title has been Dentist-Level II. In August 1998, his status changed to full-time employment. In early May 2000, DiBartolo's base salary was $73,386.00. He worked 35 hours a week and had accumulated 380 hours of overtime while working full time. (Pet. ¶ 3; Ans. Ex. 1; Resp. Let. at 1.) On May 15, 2000, HHC changed his status with his approval from full-time *per annum* to part-time *per session*. His salary changed to $53.07 per hour. He is scheduled to work 34 hours a week with no overtime, and his potential yearly salary is approximately $93,000.00 (Pet. ¶ 3; Resp. Let. at 1.)

The hourly rate of *per session* employees under the CBA is higher than the rate per hour of the *per annum* employees. At all times while he was at an HHC facility, DiBartolo's salary accorded with the terms of the 1995-2000 CBA between Doctors Council and HHC for each status in which he served.

Of the forty dentists who work in Oral Health for HHC, thirty-one work part-time and are paid on an hourly basis; nine work full-time and are paid on a *per annum* basis. At the facility where DiBartolo works, three dentists at Level II work *per annum* at 35 or 37½ hours per week, and two besides DiBartolo work *per session* at 21 and 7 hours each. (Ans. ¶ 14; Resp. Let. at 2.)

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[2] In this decision, Petition is denoted by "Pet."; Answer by "Ans."; Reply by "Rep."; Surreply by "Sur."; Exhibit by "Ex."

In response to the Trial Examiner's request, the parties submitted letters with supplemental information. Petitioner's Letter of March 19, 2001, will be denoted as "Pet. Let." and Respondent's Letter of March 21, 2001, as "Resp. Let."

POSITIONS OF THE PARTIES

Petitioner's Position

The Union's argument is that since DiBartolo receives a higher salary in his status as a *per session* employee than he did as a *per annum* employee, HHC had a duty to bargain concerning his compensation. The Union states that NYCCBL § 12-307 requires public employers to bargain in good faith over wages, including wage rates. (Pet. ¶ 6.)[3] Citing *Patrolmen's Benevolent Ass'n and City of New York & City of New York Police Dep't,*[4] Petitioner notes the Board's determination that unilateral implementation of a merit or incentive pay increase is an improper practice under the NYCCBL. Even if DiBartolo changed his hours voluntarily, the Union argues, HHC could have changed his status to part-time *per annum*, under which he would be paid proportionally, rather than part-time *per session*, under which he is paid a flat rate per hour.

According to the Union, when Ann Rozakis, Respondent's Director of Labor Relations, informed Renee Campion, the Union's Director of Contract Administration, of the change in DiBartolo's status, Campion objected and requested negotiation on the subject. (Pet. ¶ 4; Rep. ¶¶ 4-7.) Campion added that the "poor compensation of *per annum* dentists was an issue that the Union had been seeking negotiations over, and that this unilateral action to increase the salary of one employee was not the method through which the HHC should address these concerns."

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[3] NYCCBL § 12-307a reads in pertinent part:

> . . . [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates . . .).

[4] Decision No. B-4-99.

(Rep. ¶ 9.) Though Campion did request bargaining, the Union contends, it does not have to prove it made a request since HHC improperly took unilateral action while the contract was in force, and Doctors Council never waived the right to negotiate over changes in compensation. (Rep. ¶¶ 8, 11.) Petitioner likens this case to those in which the Board found that a union had not waived its right to bargain over the impact of layoffs or over the safety impact of new job specifications for Probation Officers.[5]

Petitioner asserts that the issue does not sound in contract because the Union is not claiming that HHC breached the CBA in its application to DiBartolo. Nor is managerial prerogative a defense because DiBartolo's work assignment is not in question – he has the same assignment as he had previously but with a different rate of pay. (Rep. ¶¶ 12, 13.) Finally, by violating NYCCBL § 12-306a(4), HHC derivatively violates § 12-306a(1) because failure to bargain with the collective bargaining representative interferes with employees' rights under §12-305 to "bargain collectively through certified employee organizations of their own choosing."[6]

Petitioner requests that the Board direct HHC to bargain with Doctors Council over any

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[5] *City of New York and District Council 37, AFSCME,* Decision No. B-21-75, and *United Prob. Officers Ass'n and City of New York, Dep't of Prob.,* Decision No. B-38-89.

[6] NYCCBL § 12-306a provides, in relevant part, that it shall be an improper practice for a public employer:

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> * * *
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining. . . .

Public employees have the right under NYCCBL § 12-305 . . . to bargain collectively through certified employee organizations of their own choosing. . . .

proposed changes in the compensation of employees in the bargaining unit, to bargain over DiBartolo's salary rate and title, and to rescind all changes to DiBartolo's compensation and restore him to his *per annum* title.

By letter dated March 2, 2001, the Union objected to Respondent's surreply because the Union had not raised new factual issues in its reply.

Respondent's Position

Respondent asserts that the Union has not stated a *prima facie* case and has not alleged facts sufficient to maintain a claim of a violation of NYCCBL § 12-306a(4). Respondent contends that it has no duty to bargain the change in DiBartolo's compensation or status. (Ans. ¶ 16; Sur. at 2.)

According to HHC, Renee Campion did not request bargaining but simply objected to the conversion of DiBartolo's status. Therefore, without a proper request, there could be no refusal to bargain. (Ans. ¶¶ 4, 15-20.) In addition, HHC asserts, Petitioner's claim concerns contractual issues, over which the Board lacks jurisdiction. If HHC classified DiBartolo improperly, the Union may bring a grievance. The parties have already negotiated the wages for each classification, and DiBartolo's salary conforms with those requirements. (Ans. ¶¶ 21-25.)

HHC maintains that under NYCCBL § 12-307b, HHC has a management right to classify and assign employees, and, thus, HHC has authority to determine which personnel should perform a specific job function.[7] Finally, Respondent says that it has not interfered with or

[7] NYCCBL § 12-307b states in relevant part:

> It is the right of the city, or any other public employer . . . , to determine the standards of services to be offered by its agencies . . . ; direct its employees . . . ; maintain the efficiency of governmental operations; determine the methods,

coerced any employees from exercising their rights under NYCCBL § 12-306a(1).

DISCUSSION

The issue before this Board is whether HHC committed an improper practice by refusing to bargain over the voluntary transfer of one dentist from a full-time *per annum* to a part-time *per session* position, a change that resulted in his receiving a higher rate of compensation than he had received previously. Because Petitioner has failed to allege facts sufficient to establish a *prima facie* case under the NYCCBL, this Board dismisses the petition.

As an initial matter, we respond to Petitioner's objection to the surreply. Petitioner asserts that it raised no new factual issues in the reply; however, we agree with Respondent's point in the surreply: whereas the petition focuses on the change in DiBartolo's rate of compensation, the reply concentrates on his change of status. Since the Union expanded its argument in the reply, we shall consider the contentions raised in all the pleadings. [8]

It is an improper practice under NYCCBL § 12-306a(4) for a public employer or its agents "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." A petitioner must show that the matter to be negotiated is a mandatory subject of bargaining.[9] Although

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> means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization. . . .

[8] *See Patrolmen's Benevolent Ass'n,* B-4-99 at 9-10.

[9] *DeMilia (as President of the Patrolmen's Benevolent Ass'n), and McGuire (as Police Comm'r of the City of New York), & The City of New York*, Decision No. B-14-80 at 5.

under NYCCBL § 12-307a, the issue of wages is a mandatory subject of bargaining,[10] this Board has held that "an increase in wages that accompanies a promotion or reassignment does not implicate the duty to negotiate under the statute."[11] We have found no decision of this Board – and the parties have not advanced one – that determines whether a particular employee's *per session* or *per annum* "status" is mandatorily bargainable. The burden remains on the petitioner to prove that the facts alleged amount to a violation of the NYCCBL § 12-306a(4).[12]

First, we will address the issue of bargaining over the rate of compensation. The Union does not explicitly assert that HHC is granting merit pay. However, Doctors Council cites to one case, *Patrolmen's Benevolent Ass'n,*[13] which found that the implementation of merit pay is mandatorily bargainable. In that case, the Union introduced a letter to the intended recipients of the merit pay from the Police Commissioner, who had unilaterally implemented the payment to select individuals. This Board upheld the Union's argument that the Police Department's characterizing the merit increase as a "special assignment differential" was pretextual.[14]

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[10] *See, e.g., Patrolmen's Benevolent Ass'n and The Police Dep't of the City of New York,* Decision No. B-18-93 at 12.

[11] *Communications Workers of Am. and New York City Police Dep't,* Decision No. B-20-86 at 7 (wage increases for group in one title not mandatorily bargainable except when employer acts unilaterally during grievance procedure); *see also Communications Workers of Am., Local 1180, and City of New York,* Decision No. B-47-89 at 13.

[12] *See Unif. Sanitationmen's Ass'n, Local 381, and The City of New York*, Decision No. B-68-90 at 23, 26.

[13] B-4-99.

[14] *See also United Prob. Officers Ass'n and Dep't of Prob.,* Decision No. B-44-86 at 14 (in case in which management talked with union about merit pay, Board stated that decision to grant merit increases is a management prerogative while guidelines to be applied in determining

In the instant case, the Union has alleged no facts to prove that the change in DiBartolo's compensation was a merit increase. The record reflects that DiBartolo reduced his weekly hours and eliminated all overtime work but does not indicate the reasons he did so. While his working 34 hours a week instead of 35 (and while two other *per session* employees at Family Health Services work only 21 or 7 hours each) might make the change in his compensation raise the question of merit pay, the number of hours he works, without more, is not sufficient proof that HHC acted in a pretextual manner to offer DiBartolo a merit increase. Speculative or conjectural implications are insufficient to state a cause of action.[15]

The Union's primary argument is that HHC should negotiate with the Union over all dentists' pay. When objecting to the change in DiBartolo's compensation, Campion, from the Union, told Rozakis of HHC that the "poor compensation of *per annum* dentists was an issue that the Union had been seeking negotiations over, and that this unilateral action to increase the salary of one employee was not the method through which the HHC should address these concerns." (Rep. ¶ 9.) The Union also seeks as a remedy negotiations over compensation with the whole bargaining unit. Such bargaining over unit-wide rates of compensation is not appropriately addressed in this improper practice proceeding and is better left for the parties' negotiations of their successor collective bargaining agreement. Petitioner acknowledges that DiBartolo is getting paid the proper rate of compensation for his title and status under the CBA. Whether a *per session* employee working 34 hours a week may receive more compensation than a *per*

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eligibility for merit increase are mandatory subjects of bargaining).

[15] *See Communications Workers of Am., Local 1180,* B-47-89 at 14-15.

annum employee working 35 hours per week is a topic that must be left to the parties, not this Board. Thus, HHC has no duty to bargain over DiBartolo's wages.

Nor has the Union demonstrated that HHC committed an improper practice by allowing DiBartolo to change his status from *per annum* to *per session.* Petitioner has not proved that the issue of status is a mandatory subject of bargaining or explained how status has been determined at HHC facilities. *United Probation Officers Ass'n* and *District Council 37, AFSCME,*[16] cited by Petitioner for the proposition that the unions had not waived their right to bargain, are inapposite because they address the issue of impact on groups in scope of bargaining cases. Petitioner here has not alleged that DiBartolo's change of status has had any impact on other unit members. Furthermore, the Union does not suggest that HHC must bargain over every employee's voluntary change in hours.

The record does not provide an explanation for the difference in rates of compensation between part-time *per session* and part-time *per annum* employees. Furthermore, the Union has failed to allege facts demonstrating HHC's motivation in changing DiBartolo's status. Although the Union states that a contract issue is not involved here, the appropriate course to pursue a claim that HHC misclassified DiBartolo is the contractual grievance procedure.

Finally, Petitioner has not sufficiently provided disputed issues of fact pertaining to the reasons for DiBartolo's change of status and resulting compensation to warrant a hearing in this matter.[17] Since the Union has failed to state a *prima facie* case under NYCCBL § 12-306a(1) and

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[16] Decision Nos. B-38-89; B-21-75.

[17] *Unif. Sanitationmen's Ass'n,* B-68-90 at 26.

(4), this Board dismisses the instant improper practice petition in its entirety.[18]

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 submitted by Doctors Council be, and the same hereby is, dismissed.

Dated: June 14, 2001
New York, New York

MARLENE A. GOLD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GABRIELLE SEMEL
MEMBER

CHARLES G. MOERDLER
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

[18] This Board finds it unnecessary to address the parties' other arguments – such as the proponent's need to request bargaining under NYCCBL § 12-306a(4) or the § 12-306a(1) interference issue.