City v. UFT, 67 OCB 28 (BCB 2001) [Decision No. B-28-2001 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioners,

-and-

Decision No. B-28-2001
Docket No. BCB-2162-00
(I-234-00)

UNITED FEDERATION OF TEACHERS,

Respondents.

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DECISION AND ORDER

The City of New York ("City") filed a verified scope of bargaining petition against the United Federation of Teachers ("Union"), alleging that certain demands – relating to the provision of changing facilities and storage of personal items, and holidays for School Safety Supervisors – are not within the scope of bargaining at the unit level and should not be submitted to an impasse panel for consideration.[1] The Union argues that the demands are mandatory subjects of bargaining, and need not be bargained only at the Citywide level. We find that under the circumstances of this case, and pursuant to § 12-307a(2) of the NYCCBL, the demand relating to the provision of changing facilities and storage of personal items cannot be bargained at the unit level and the demand relating to holidays can be bargained at the unit level.

BACKGROUND

On December 20, 1998, School Safety Supervisors were functionally transferred from the

[1] The petition was filed for determination as to whether the issues are matters within the scope of bargaining pursuant to § 12-307 of the New York City Collective Bargaining Law ("NYCCBL").

Board of Education of the City School District of the City of New York ("Board of Education") to the City's Police Department. Prior to the transfer, the School Safety Supervisors were covered by a collective bargaining agreement between the Board of Education and the Union. The City and the Union met on a number of occasions prior to the functional transfer to discuss the impact of this transfer upon the School Safety Supervisors.

On May 15, 1999, the City and the Union entered into a Memorandum of Understanding ("MOU") that provided that the transferred employees would no longer be covered by the Board of Education/Union collective bargaining agreement after the date of the transfer [City Exhibit "A"]. The City and the Union also agreed that School Safety Supervisors would be covered by all applicable provisions of the 1990-92 Citywide Agreement, as amended by the 1995-2000 MCMEA. The MOU also provided that a separate unit agreement would be negotiated between the City and the Union to cover the transferred employees.

The parties met and engaged in collective bargaining for a unit agreement ten times between March 1, 1999, and March 13, 2000. During the course of negotiations, most issues were resolved by the parties. The Union and the City, however, were unable to come to an agreement regarding locker rooms and holidays. On June 15, 2000, the Union submitted a request for the appointment of an impasse panel to the Board of Collective Bargaining ("Board"), alleging that the parties had reached an impasse in negotiations. The Union's request specifies five issues on which the parties are at impasse, among them, the two that are now presented to the Board in this Scope of Bargaining petition. On September 26, 2000, and October 5, 2000, the parties engaged in mediation, during which certain of these issues were resolved. On October 11, 2000, the Board declared that an

impasse exists between the parties. Subsequently, the City filed this scope of bargaining petition on November 13, 2000.

POSITIONS OF THE PARTIES

City's Position

The City argues that the demand related to the provision for changing facilities and storage of personal items should be dismissed as vague because, while raised as a safety issue, the Union has failed to demonstrate how providing these items has any connection to, or effect on, the safety of the School Safety Supervisors. Even if the Board finds that the demand is not so vague and ambiguous as to render it a non-mandatory subject, then, according to the City, the demand should nonetheless be held to be a non-mandatory subject of bargaining. Matters which affect all Career and Salary Plan employees and not just those in a particular bargaining unit constitute Citywide issues unless the Union representing that unit can demonstrate a special and unique circumstance which would make bargaining appropriate at the unit level.[2] The City contends that matters related to health and safety constitute Citywide issues for bargaining.[3]

The specific demand for changing facilities and the storage of personal items must be considered a non-mandatory subject of bargaining because the allocation of space is a management prerogative, the City has "broad discretion" in allocating space, and only very specific and extreme conditions make bargaining for a locker room a mandatory subject of bargaining.[4] In Decision No.

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[2] Decision No. B-59-89.

[3] *See* Decision Nos. B-23-85; B-2-73; B-11-68.

[4] Decision No. B-43-86 (UFA Demand No. 8).

B-43-86, the Board held that the issue of locker rooms for Fire Marshals was a mandatory subject because the Fire Marshals wore protective gear required for their safety on the job, they regularly got wet and dirty in the course of their employment, and the group of Fire Marshals involved in the case were the only Fire Marshals without a locker room. The City points out that, in contrast, the Board has ruled unfavorably on two other attempts to have the issue of locker rooms declared a mandatory subject because the Union had not shown the exceptional circumstances necessary to limit management's prerogative.[5]

The number of holidays a Career and Salary employee is entitled to has already been a subject of bargaining at the Citywide level and may be bargained only at that level.[6] The circumstances here do not present any special and unique circumstances demonstrating why bargaining would be appropriate at the unit level over the issue of holidays – there are at least three Department of Health titles assigned to work in the Board of Education and those titles are covered by the Citywide Agreement. All of the employees in those titles work for the Department of Health but are assigned to schools operated by the Board of Education.

The City points out that the Union does not dispute that the School Safety Supervisors are governed by the Citywide Agreement.[7] Moreover, the Union has already agreed in the MOU that all employees functionally transferred are bound by applicable provisions of the Citywide Agreement. By claiming that the holiday section of the Citywide Agreement is not "applicable"

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[5] Decision Nos. B-59-89 and B-4-89.

[6] Decision No. B-11-68.

[7] The number of holidays was set in Article V, § 9 of the January 1, 1995 – June 30, 2001 Citywide Agreement.

here, the Union essentially seeks to re-open the issue of holidays before the Citywide Agreement expires, a process which is prohibited by § 12-311a(3) of the NYCCBL. The Union has already bound itself to the applicable provisions of the Citywide in the MOU, and the Union may not exempt itself from those provisions simply because it believes they are now unpalatable.

Union's Position

The Union argues that changing and storage facilities are imperative to the safety of the School Safety Supervisors, who are required by the City to wear uniforms strikingly similar to those worn by police officers. Since the public might confuse the School Safety Supervisors traveling to and from work with police officers, and since the School Safety Supervisors do not have necessary protective gear, the Union asserts that it has demonstrated a real issue of safety.[8] These dangers could be prevented if the officers are given lockers and a changing area, which would allow them to travel to and from work in civilian attire. In this context, the demand constitutes a mandatory subject of bargaining. The Union asserts that the Board has long held that safety issues are within the scope of mandatory bargaining, and that impasse procedures should be promptly utilized before the implementation of a plan which is found to entail a practical impact.[9]

Bargaining on this subject is necessary because the Citywide Agreement does not address either safety issues or the provision of locker rooms/changing facilities. The Board has held that those matters that are required to be uniform for all employees relate solely to wage and leave

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[8] The Union asserts that the School Safety Supervisors are not provided weapons, protection, or transportation to and from work like police officers.

[9] Decision No. B-5-75 at 13-14.

issues.[10] The City's argument that the demand interferes with its management rights is spurious at best.

As for the subject of holidays, the Board has repeatedly held that time, leave, and time off are mandatory subjects of bargaining. While the Union agreed that the transferred employees would be covered by all applicable provisions of the 1990-93 Citywide Agreement, the Union did not surrender its right to bargain over holiday schedules. Although § 12-307(a) states that certain matters such as overtime and time and leave rules must be uniform, the Union has the right to bargain for a variation where special and unique considerations are involved.

Here, the circumstances of the School Safety Supervisors are sufficiently special to allow for unit bargaining on holidays. The officers are now employed by the Police Department, but still perform the same job function as they did as Board of Education employees, work in the same facilities, and work under the same conditions. The Board of Education operates on a school year schedule that is determined in part by the Board of Education and in part by statutory requirements for any educational system in this state. The days and hours on which the Board of Education provides services to the public are unique and different from those of the City in general or the Police Department specifically.

Moreover, the Union asserts that the situation created by the functional transfer is unique to New York City School Security employees. The City's employees are now required to work in a facility of another employer that sets its hours of operation and levels of services in a manner independent from the City and the Police Department. For these reasons, the holiday schedule of

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[10] Decision No. B-11-68 at 7.

officers needs to be tailored to meet the requirements not of the City, but of a different employer for whose benefit these school security positions actually exist. The City's claim that the Union is trying to renegotiate this issue is simply wrong because in the MOU, the parties agreed only to be bound by "all applicable provisions" of the Citywide Agreement, and recognized that a separate unit agreement would then be negotiated.

DISCUSSION

The dispute in this case concerns a question of the appropriate level of bargaining under the NYCCBL. Section 12-307a(2) of the NYCCBL states that:

> . . .[P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages . . . , hours (including but not limited to overtime and time and leave benefits) [and] working conditions . . . except that . . . :
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> (2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employees organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved.

There is no dispute that the issue of holidays involves a matter of time and leave, and is among the subjects that ordinarily must be mandatorily bargained at the citywide level. However, where considerations special and unique to a particular department, class of employees, or collective bargaining unit exist, a union may bargain for a variation from a particular application of the Citywide Agreement. In considering whether an issue falls within this provision of § 12-307a(2) of

the NYCCBL, there are two conditions that must be met: employees subject to the Career and Salary Plan must show a special and unique consideration with regard to a particular term of the Citywide Agreement or policy; and the term itself must be a mandatory subject of bargaining.[11]

Holiday leave is undoubtedly a mandatory subject of bargaining under § 12-307a of the NYCCBL. Therefore, we must determine whether the Union has shown the requisite special and unique considerations. In *Committee of Interns and Residents & City of New York and New York City Health and Hospitals Corp.*,[12] we held that special and unique circumstances existed when a certain group of Union members' employment duties arguably required the use of an automobile and the employment obligations of those members arguably differed from those of other employees in the department. In *City of New York & Social Service Employees Union*,[13] we held that a proposal that Case Aides should be credited with annual and sick leave for their prior service as Case Aide Trainees, during which training period they were paid by federal funds and were not City employees, involves special and unique considerations.[14]

Here, too, we are satisfied that the Union has shown that special and unique circumstances exist. Prior to the functional transfer, the School Security Supervisors enjoyed a certain number of holidays, to which they are no longer entitled. Under the Citywide holiday schedule, the School

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[11] *United Probation Officers Ass'n & City of New York and the New York City Dep't of Probation*, Decision No. B-27-95; and *United Probation Officers Ass'n & City of New York Dep't of Probation & District Council 37, AFSCME, AFL-CIO*, Decision No. B-48-89.

[12] Decision No. B-11-92.

[13] Decision No. B-11-68.

[14] *Id.* at p. 12.

Safety Supervisors would be working for one employer with a distinct set of holidays, but held to the schedule of another. As the Union correctly asserts, the days and hours that the Board of Education, a wholly different employer from the City, provides services are different from those of the City in general or the Police Department specifically.

The primary function of the School Safety Supervisors is to provide services at the school when schools are in operation, and holding these employees to the holiday schedule of other City employees may result in School Safety Supervisors reporting to work on days where the school is closed. Also, these employees are uniquely situated because, as a consequence of their functional transfer to City employment, while continuing to perform the same duties, they have lost the benefit of the contract with their former employer, the Board of Education, and this is their first opportunity to negotiate this subject with their new employer, the City. This showing sufficiently distinguishes the School Safety Supervisors from other employees covered by the Citywide Agreement so as to make their circumstances "special and unique" under § 12-307a(2) of the NYCCBL.

With respect to the Union's demand to bargain over the provision of changing facilities and storage of personal items, we have held, in *New York State Nurse Ass'n & City of New York and New York City Health and Hospitals Corp.,* that a demand concerning health and safety is subject to Citywide bargaining.[15] The Union has not shown the required special and unique considerations to mandate bargaining at the unit level; we are not persuaded by the Union's assertion that the School Safety Supervisors are at risk if they wear their uniforms while commuting to and from work because this contention is speculative and not supported by any specific allegations.

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[15] Decision No. B-2-73 at p. 11.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that the Union proposal regarding the provision of changing facilities and storage of personal items is not within the scope of collective bargaining by the Union herein; and it is further

DETERMINED, that the Union proposal related to holidays is within the scope of collective bargaining by the Union herein.

Dated: June 14, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GABRIELLE SEMEL
MEMBER

I dissent. RICHARD A. WILSKER
MEMBER

I dissent. EUGENE MITTELMAN
MEMBER