DC 37 v. City, 67 OCB 36 (BCB 2001) [Decision No. B-36-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

Decision No. B-36-2001
Docket No. BCB-2156-00

CITY OF NEW YORK,

Respondent.

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DECISION AND ORDER

District Council 37, AFSCME, AFL-CIO (the "Union") filed a verified improper practice petition against the City of New York ("the City") alleging that the City failed to bargain over its new policy of appointing candidates from civil service lists to permanent competitive class positions as full-time per diem employees rather than full-time per annum employees. The Union claims that the City violated §§12-305 and 12-306a(1) and (4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City argues that the petition must be dismissed because the Union already engaged in negotiations on behalf of full-time per diem employees, and these issues cannot be re-negotiated until the subsequent contract negotiations begin. Since the Union's claims are founded in a unilateral change to a subject that is already addressed in the parties' collective bargaining agreement and requires interpretation of the agreement itself, we defer the improper

practice claim to the parties' contractual grievance process.

BACKGROUND

This dispute arises out of the City's practice, over the years, of hiring some full-time employees in competitive titles without competitive examination, and paying these employees on a per diem -- hourly or daily -- basis. The parties' collective bargaining agreement ("CBA") defines the term employee as "a full-time per annum worker, unless otherwise specifically indicated herein." The term full-time per diem employee is not defined in the CBA. However, Article I, §5, of the CBA, sets forth the terms and conditions of employment of per diem employees. Essentially, per diem employees, unlike per annum employees, do not receive 12 paid holidays and certain health, welfare fund, legal services, and training fund benefits until they have completed 18 months of service.

On or about December 6, 1999, the Union filed a petition in Supreme Court of the State of New York, Index No. 124432/99, on behalf of certain long-term per diem employees. The Union sought City compliance with the New York State Civil Service Law that the City fill the positions held by per diem employees with candidates from the appropriate civil service lists.

On June 28, 2000, the Department of Citywide Administrative Services ("DCAS") issued a memorandum creating a new policy whereby per diem employees would be selected from the appropriate civil service lists. The memorandum also stated that the City hiring agency could offer the candidates full-time, permanent positions as either per annum or per diem employees. The effect of this policy was to render the Union's petition moot and to allow the City to

continue its practice of not paying per diem employees the same benefits as per annum employees during the first 18 months of their employment.

Article XV, §1, of the CBA provides that "the term grievance shall mean a dispute concerning the application or interpretation of the terms of this Agreement." On July 6, 2001, the Union filed a request for arbitration claiming that the City violated the rights of certain full-time competitive class employees appointed to permanent full-time positions by mischaracterizing them as per diem employees and thereby wrongfully limiting the benefits to which they are entitled under the CBA.

On October 30, 2001, the Union filed the instant petition challenging the City's new policy of appointing candidates from the civil service list as per diem employees rather than per annum employees in violation of the NYCCBL.

POSITIONS OF THE PARTIES

The Union's Position

The Union argues that by implementing a policy of appointing permanent competitive class employees to per diem positions, the City has unilaterally changed the terms and conditions of permanent employees contrary to the provisions of the CBA, in violation of NYCCBL §12-306a(4). The Union also argues that by adopting a policy which relegates permanent competitive class employees to permanent per diem status, the City has interfered with and restrained these public employees in the exercise of their protected bargaining rights in violation of NYCCBL §§12-305 and 12-306a(1).

The City's Position

The City argues that: (1) the petition is untimely; (2) the issues regarding per diem employees were fully negotiated by the parties and the NYCCBL prohibits the reopening of the CBA at this time; and (3) the budgetary decision to appoint employees on either a per diem or per annum basis is a management prerogative that is not a mandatory subject of bargaining.

DISCUSSION

As a threshold matter, this Board must decide whether the petition is timely. Section 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("Rules") and §12-306(e) of the NYCCBL provide that a petition alleging an improper practice in violation of §12-306 may be filed no later than four months after the disputed action took place. Here, the writing of the memorandum which sets forth the disputed policy was issued on Wednesday, June 28, 2000. The petition was filed on Monday, October 30, 2000. Four months from June 28, 2000 was Saturday, October 28, 2000. Pursuant to Rule §1-13(d), when computing any period of time prescribed by these Rules, "the last day of the period shall be included, unless it falls on a Saturday, Sunday or a legal holiday, in which event the period shall run to the next business day." Because the period to file ran on a Saturday and the Union filed on the next business day, we deem the petition timely.[1]

We now turn to the issue of whether this improper practice petition should be deferred pending arbitration of the Union's grievance. It is an improper practice under §12-306a(4) of the NYCCBL 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. . . .

[1] *See also* New York General Construction Law §25-a.

An employer's unilateral action on a mandatory subject of bargaining may violate this provision.[2] However, in *Correction Officers Benevolent Ass'n,* Decision No. B-39-88 at 15, this Board stated that when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement, this Board's jurisdiction under NYCCBL §12-306a(4) may not be invoked. The Union should raise any such claim in the context of the grievance procedure and not in an improper practice proceeding.[3]

In addition, §205.5(d) of the Taylor Law (Civil Service Law, Article 14), which applies to this Board as well as to PERB, provides in pertinent part:

> . . . the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

PERB has consistently interpreted this provision of the Taylor Law to deprive it of jurisdiction over improper practice charges of failure to negotiate when the underlying disputes are essentially contractual.[4] A jurisdictional issue must be addressed at the outset if the "agreement is a reasonably arguable source of the right to the charging party with respect to the same subject matter as the improper practice charge" or, "even if the agreement does not address specifically the particular allegations of the improper practice charge if the agreement is a source of right to

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[2] *E.g.*, *LaRiviere,* Decision No. B-36-87 at 9.

[3] *See Civil Serv. Technical Guild*, Decision No. B-11-99 at 9; *United Probation Officers Ass'n*, Decision No. B-38-91 at 17*; Patrolmen's Benevolent Ass'n*, Decision No. B-24-87 at 7, *aff'd sub. nom. Caruso v. Anderson*, 138 Misc.2d 719, 525 N.Y.S.2d 109 (N.Y. Co. 1987), *aff'd*, 145 A.D.2d 1004, 536 N.Y.S.2d 689 (1st Dept. 1988), *lv. denied*, 73 N.Y.2d 709, 540 N.Y.S.2d 1004 (1989).

[4] *E.g., County of Nassau*, 25 PERB ¶ 3071 (1992).

the charging party with respect to the subject matter of the charge."[5]

We find that Article I, §§4 and 5, of the CBA are reasonably arguable sources of the petitioned for per diem employees' entitlement to the disputed benefits. Therefore, we defer the improper practice claim to the parties' contractual grievance process, which has already been commenced.

While the Union characterizes its improper practice as a refusal to bargain over the provision of benefits to certain per diem employees, an issue which it contends is a mandatory subject of bargaining, Article I, §5, demonstrates that the parties have already negotiated per diem employee benefits. The Union does not claim merely that the City failed to negotiate on a matter which by definition is a term and condition of employment subject to mandatory collective bargaining. Rather, it argues that the City improperly created a new category of employee -- a permanent full-time competitive *per diem* employee who is not entitled to the same benefits under the CBA as the comparable permanent full-time competitive *per annum* employee. Analysis of this claim is grounded in contract interpretation. It turns on the question whether employees in this new category of workers are "per diem" for purposes of Article I, §5, or are "full-time per annum workers" within the meaning of Article I, §4. The answer to this question may depend, in part, on the meaning of the term "per diem employee," which is now undefined in the collective bargaining agreement, and whether the parties intended Article I, §5, to apply only to those employees engaged under the City's previous practice of hiring some full-time employees in competitive titles without competitive examination, and paying them on a per diem – hourly or daily – basis. As demonstrated by the pleadings, there is a genuine dispute about the

[5] *County of Nassau*, 23 PERB ¶ 3051, at 3108 (1990).

terms and conditions discussed by the parties, during negotiations of the CBA, concerning per diem employees. This is a matter that should be resolved by an arbitrator.

These claims addressing the City's unilateral change in a working condition, arguably covered by the CBA, must be deferred to the parties' grievance process because this Board lacks jurisdiction to consider the improper practice charge at this time. Permitting such disputes to proceed first to arbitration is consistent with the declared policy of the NYCCBL "to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."[6] We have stated these principles in past decisions; however, to the extent that other prior decisions conflict with this determination, they will no longer be followed.

The petition is administratively deferred, subject to a motion to reopen should the City successfully raise in the grievance arbitration context any argument which forecloses a determination regarding the merits of the grievance or should any award be repugnant to rights under the NYCCBL.

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[6] *United Probation Officers' Ass'n,* Decision No. B-38-91 at 13; *see also Uniformed Sanitationmen's Ass'n,* Decision No. B-68-90 at 16.

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 filed by District Council 37, AFSCME, AFL-CIO, docketed as BCB-2156-00 be, and the same hereby is, deferred until such a time as an arbitrator renders a determination, and issues an opinion and award upon which this Board may further determine whether an improper practice was committed by the City of New York.

Dated: New York, New York
October 29, 2001

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER