L. 237, CEU v. OLR, 67 OCB 37 (BCB 2001) [Decision No. B-37-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding
-between-

CITY EMPLOYEES' UNION, LOCAL 237,
I.B.T., AFL-CIO,
Petitioner,

-and-

Decision No. B-37-2001
Docket No. BCB-2198-01

NEW YORK CITY OFFICE OF LABOR RELATIONS,
Respondent.
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DECISION AND ORDER

The City Employees Union, Local 237, International Brotherhood of Teamsters, ("Local 237" or "Union") filed a verified improper practice petition alleging that the City of New York and the Office of Labor Relations ("OLR" or "City"), failed to bargain in good faith over the allocation of prevailing wage and benefit rates established by the New York City Comptroller pursuant to Section 220 of the New York State Labor Law ("Labor Law").[1] Because this Board of Collective Bargaining ("Board") finds that it lacks jurisdiction over this claim, the petition is denied.

BACKGROUND

The Union is the exclusive collective bargaining agent for employees in the following titles: Elevator Mechanic, Supervisor Elevator Mechanic, and Elevator Mechanic Helper;

[1] The Union claims that the City violated Section 12-306a(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

Plasterer and Supervisor Plasterer; Bricklayer and Supervisor Bricklayer; Cement Mason; and Roofer and Supervisor Roofer. These employees serve in titles that are covered by Labor Law § 220, which requires the payment of wage rates and supplements prevailing in the area in which the work at issue is to be performed.

Section 220 provides procedures through which the prevailing rate is established by a local government's fiscal officer, generally through an investigatory process and litigated hearings. In New York City, this process is conducted by the City's fiscal officer, the Comptroller. However, since 1984, § 220 has also provided that, in the case of cities of one million or more, in which the majority of employees in a title are members of an employee organization that is certified or recognized under the Taylor Law or a local law enacted thereunder, the public employer and the employee organization "shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements . . ." of the employees in the title.[2] When the public employer and the employee organization reach an agreement with respect to wages and supplements, the terms of the agreement are reflected in a "consent determination" which is issued by the local fiscal officer.

Section 220 further provides that if the public employer and the employee organization "fail to achieve an agreement," the employee organization can file a complaint which initiates the statutory process for obtaining an independent determination by the local fiscal officer. Apart from wage and supplement rates, bargaining with respect to working conditions of § 220 employees is conducted under subdivision (1) of § 12-307a of the NYCCBL.

In the instant matter, the Comptroller sent a notice of investigative findings in November

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[2] 1984 New York Laws, chapter 767, amending Labor Law § 220.8-d.

2000 to OLR Commissioner James F. Hanley and to counsel for Local 237. By letter dated November 29, 2000, Nicholas Mancuso, Secretary-Treasurer of Local 237, asked Hanley to schedule a collective bargaining session for a successor contract covering employees in the above titles. No collective bargaining session was scheduled.

The Union then filed a verified improper practice petition with the Office of Collective Bargaining ("OCB") on February 2, 2001, alleging a failure to bargain. On February 9, the Union withdrew the petition when City and Union representatives scheduled a meeting for February 26, 2001. No bargaining took place at that meeting. The Union filed the instant petition on March 5, 2001.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union does not dispute the City's contention that the Comptroller is authorized to set wage and benefit rates for § 220 employees and that bargaining over those rates is governed by the Labor Law rather than the NYCCBL, but the Union contends that it seeks not to bargain over wages and benefits but rather over working conditions including the "allocation of the monies" after the Comptroller has determined the relevant prevailing wage and benefit rates. The Union contends that the City is obligated under the NYCCBL to bargain over such working conditions once prevailing rates have been established by the Comptroller.

From November 29, 2000, and continuing for approximately two months, the City refused to schedule negotiation sessions for a successor collective bargaining agreement covering employees in the titles at issue here. The Union contends that the February 26 meeting was "for

the purpose of negotiating the terms and conditions of a new consent determination; however, the City was not prepared to negotiate substantive terms and conditions for a new consent determination. . . ." (Pet. ¶ 11, Riders No. 1–5)[3] According to Local 237, OLR representatives told Union representatives that the City did not know when it would be prepared to negotiate substantive terms and conditions with the Union and could not offer a new date for negotiations. Thus, the City's "continued failure and refusal to bargain" with Local 237 violates subdivision (4) of § 12-306a of the NYCCBL with respect to each of the five titles at issue here.

Respondents' Position

The City contends that this Board has no authority to entertain a claim of failure to bargain under the cited section of the Labor Law. The City admits that it scheduled a meeting for February 26, 2001, (Ans. ¶ 9) and that the parties did meet on that day (Ans. ¶ 11), but, contrary to the Union's contention, the meeting was not for the purpose of negotiating terms and conditions of a new consent determination. (Ans. ¶ 11) The City does not identify the purpose of the meeting.

The City also contends that before the February 26 meeting, OLR Assistant Commissioner Ralph Pavia contacted Mancuso and advised him that OLR had not received information to enable the City to analyze the potential cost of prevailing wages and benefits. On the day of the meeting, OLR Assistant Commissioner Richard Yates reiterated that the City was awaiting that information and that, without it, no bargaining could take place.

The information sought concerns pension benefit rates which arguably could affect bargaining on other economic issues. According to the City, the notice of investigative findings

[3]The following abbreviations are used herein: petition - "Pet." and answer - "Ans."

which OLR and the Union received in November 2000 contained only "likely" prevailing wage and benefit rates for the affected employees. OLR had not received a response to its request from the Office of the Actuary for the additional information at the time the Answer in the instant proceeding was filed.

DISCUSSION

In the case before us, the Union argues that what it seeks is bargaining not over the establishment of wages or supplement rates but over the allocation of those rates. It asserts, first, that such allocation, which it fails to define, constitutes a working condition and, second, that this Board has jurisdiction to direct bargaining over working conditions of employees subject to Labor Law § 220. On the other hand, the City argues that the Union is actually seeking to compel bargaining to establish terms of a consent determination with respect to wage and benefit rates under Labor Law § 220. We find the City's argument more persuasive and deny the instant petition because it concerns a matter that is outside of our jurisdiction..

Under the NYCCBL, an employer's duty to bargain with respect to employees subject to Labor Law § 220 is treated as an exception to the general rule set forth in § 12-307a. NYCCBL § 12-307a(1) provides that, subject to the provisions of subdivision b of this section and subdivision c of § 12-304 of this chapter:

> public 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, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) [and] working conditions . . . except that:
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> > (1) with respect to those employees whose wages are determined under section two hundred twenty of the labor law, the duty to bargain in good faith over *wages*

and supplements shall be governed by said section. . . . (Emphasis added.)

Generally, a public employer does have a duty under the NYCCBL to bargain over the working conditions of § 220 public employees which do not involve wages or supplements.[4] Despite the Union's arguments, we find that the Union's claim relates, not to working conditions but to wages and supplements.

We have defined the term "wages" as including wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums.[5] We have not defined the term "wage supplements" as it pertains to employees subject to Labor Law § 220, but subdivision 4(b) of that section describes "supplements" as "remuneration for employment paid in any medium other than cash or reimbursement or any payments which are not 'wages' within the meaning of the law but not limited to health, welfare, non-occupational, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training."

We conclude that, in the context of this case, the term "wages" includes the allocation of funds which are derived from prevailing rates that are the subject of negotiations as required under Labor Law § 220. Whether that money is allocated to one category or another of wages and benefits, or to supplements, the result of the allocation has an impact on the financial resources of the City and the paychecks of the employees at issue, not on the conditions under which employees perform their official duties.

Having found that the bargaining sought by the Union concerns wages and supplements,

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[4]*See District Council 37, AFSCME*, Decision No. B-29-80 at 5.

[5]*See, e.g., Comm. of Interns and Residents*, Decision No. B-22-92.

the question remains: can the City's duty to bargain be enforced under the NYCCBL? We conclude that it can not be.

The plain language of subdivision 8-d of § 220, as amended, establishes a duty to bargain in good faith for an agreement with respect to wages and supplements. The source of this duty is the Labor Law, not the NYCCBL, a fact recognized in the express language of NYCCBL § 12-307a(1). We find that the remedy for any breach of that duty to bargain is also set forth in the Labor Law. Section 220.8-d states that, if the parties "fail to achieve an agreement," the Union may file a complaint under § 220.7 of the Labor Law. Since the duty to bargain and a mechanism for its enforcement have been placed in the Labor Law, there is no basis for this Board to exercise jurisdiction over the same matters.

For this reason, we deny the petition in its entirety.

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 docketed as BCB-2198-01 be, and the same hereby is, denied in its entirety

Dated: October 29, 2001
New York, NY

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

RICHARD A. WILSKER
MEMBER

I Dissent. CHARLES G. MOERDLER
MEMBER