L. 371, SSEU v. ACS, 69 OCB 22 (BCB 2002) [Decision No. B-22-2002 (IP)]

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

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO,

Petitioner,

- and -

ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondent.
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Decision No. B-22-2002
Docket No. BCB-2207-01

**DECISION AND ORDER**

On April 27, 2001, Social Service Employees Union, Local 371, AFSCME, AFL-CIO ("Union") filed a petition alleging that the City of New York Administration for Children's Services ("ACS" or "City") failed to bargain over the procedures, criteria, and guidelines for implementation of merit increases in violation 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 is untimely, the guidelines and procedures for the implementation of merit increases are not a mandatory subject of bargaining, or in the alternative, that the Union waived its right to bargain this issue. For the reasons set forth below, the petition is granted.

**BACKGROUND**

The Union is the exclusive bargaining representative for various ACS employees,

including Child Protective Specialist, Child Welfare Specialist, Child Protective Specialist Supervisor, and Child Welfare Specialist Supervisor. In December 1997, ACS proposed certain reforms to its operations. In January 1998, in a State of the City Address, then Mayor Giuliani announced the City's intention to establish two new employee titles that would be unique to ACS and that would be eligible for merit increases. Between January 30, 1998, and April 9, 1998, the City and the Union exchanged correspondence concerning the establishment of the new titles and in June 1998, conducted labor-management meetings on this topic.

The parties' collective bargaining agreement, effective from 1992 to 1995, provided that with regard to merit increases, "[t]he Employer agrees to notify the Union of its intent to grant merit increases." (Article III, Section 11.) In May 1998, the parties were engaged in bargaining regarding their 1995-2000 Collective Bargaining Agreement ("CBA"). During the course of bargaining, the Union submitted 274 demands including Demand No. 28 which stated:

a. The Employer agrees to notify the Union 30 days prior of its intent to grant merit increases.

b. The Employer agrees to negotiate with the Union the criteria for eligibility for the granting of merit increases.

c. The Employer agrees not to discriminate awarding merit increases.

Prior to the next bargaining session, the parties had two "labor-management meetings" during which they discussed the City's intention to create the new job titles which would be subject to merit-based performance awards. At the next bargaining session on June 24, 1998, the Union agreed to drop demand 28 and utilize the language in the parties' previous CBA. Accordingly, Article III, Section 11, of the 1995-2000 CBA remained unchanged from the expired agreement.

On November 10, 1998, ACS announced the creation of the newly established ACS titles and stated that the new titles would be eligible for merit increases when they were offered.

On May 30, 2000, ACS issued a memorandum to its Program Heads and Managers setting forth the procedures and criteria for implementing merit increases for the newly created titles, for example that the employee must have served in a title for 18 months and have an overall performance rating of very good or outstanding. By letter dated June 12, 2000, the Union advised the City that the procedures and criteria for implementing merit increases, as set forth in the May 30, 2000, memorandum, were mandatory subjects of bargaining. By letter dated June 16, 2000, the City responded that it had complied with its contractual obligations, which require the City only to notify the Union of its intention to grant merit increases.

By letter dated July 18, 2000, the Union asserted that the notice provision of the 1995-2000 CBA did not negate the City's statutory duty to bargain over the implementation of the merit increases. By letter dated August 7, 2000, the City responded that it had satisfied both its statutory and contractual obligations relating to the merit increases.

On March 1, 2001, the parties met to discuss the ACS merit increases. The City denies that the Union again requested negotiations at that meeting, and neither party specifies the details of what was discussed at the meeting. However, the City admits that the following day, the Union sent a written request for information relating to implementation of the increases, for the City's response to the Union's assertion that the parties were obligated to negotiate criteria and procedures concerning implementation, and for a response to the Union's criticism of certain

eligibility criteria.[1]

On April 17, 2001, the City announced that 603 ACS employees had been awarded a 7% merit-based pay increase for outstanding job performance. On April 23, 2001, the Union filed the instant improper practice petition alleging violations of §§12-306(a)(1) and (4) of the NYCCBL.[2]

## POSITIONS OF THE PARTIES

### Union's Position

In response to the City's answer, the Union argues that the petition is timely because until April 17, 2001, when the City announced it had implemented merit-based wage increases, the Union did not have "actual knowledge of acts which put it on notice to complain." In addition, the Union asserts that wages, particularly the procedures and guidelines for the implementation of merit increases, are mandatory subjects of bargaining and do not fall within the management rights provision in NYCCBL §12-307b.[3] Therefore, the City's refusal to negotiate over

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[1] The record is silent as to whether or not the City responded to the Union's March 2, 2001, letter.

[2] NYCCBL §12-306(a) provides, in relevant part, that it shall be an improper practice for a public employee to:

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

* * *

(4) refuse to bargain collectively in good faith on matters within the scope of collective bargaining. . . .

[3] NYCCBL 12-307(b) grants the employer the right "to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees. . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise

implementation of the ACS merit increases violates the NYCCBL. The Union also asserts that during contract negotiations it did not waive its statutory right to bargain this issue.

**City's Position**

The City argues that: (1) the petition is untimely because the Union should have filed its petition within four months of the issuance of the May 30, 2000, memorandum, which established the procedures and guidelines for merit increases; (2) the procedures and criteria for implementing the merit increases are not mandatory subjects of bargaining, and the Union has failed to state a prima facie claim of an improper practice; (3) the standards and criteria for granting merit increases are based on the same criteria for performance evaluations, which are not mandatory subjects of bargaining and fall within the managements rights provisions of NYCCBL §12-307(b); and (4) during bargaining negotiations, the parties agreed that the City need only notify the Union of its intent to grant merit increases and that the Union dropped and, thereby, waived its demand to bargain over the procedures and guidelines for merit increases.

## DISCUSSION

As a preliminary matter, we find that the petition is timely. Section 12-306(e) of the NYCCBL and 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1), 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 occurred. A petition is timely unless an action arises more than four months prior to the filing of the petition, and

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complete control and discretion over its organization and the technology of performing its work. . . ."

there is no allegation that the action continued or accrued at any time within the four month time limitation. *District Council 37, AFSCME*, Decision No. B-61-91 at 8. We have consistently held that "a union appropriately interposes itself only after an action of management has had an immediate impact on the employees represented by the union, or that it necessarily entails an impact in the immediate or foreseeable future. Thus, a party may choose to await performance of an action and file an improper practice charge within four months after the intended action is implemented and the charging party is injured thereby." *Id. at 7-8 (footnote omitted).*

In *United Probation Officers Ass'n*, Decision No. B-44-86, we found timely the Union's petition seeking to negotiate criteria and procedures for the granting of merit increases even though the administrative order which provided those guidelines had been issued nine years before the City announced its intention to implement the merit plan. The Board stated that until the announcement of the merit increase program and its imminent implementation, the union did not have "actual or constructive knowledge of definitive acts which put it on notice of the need to complain." *Id. at 18*.

Applying these principles to the instant matter, we find that the Union's petition is timely because it was filed within four months of the granting of the merit increase. Although the Union may have known that ACS had created procedures and guidelines as early as May 30, 2000, only when ACS implemented the merit increases was there direct impact on the bargaining unit employees. Therefore, the Union's cause of action arose based on the City's definitive act of implementing the merit increases on April 17, 2001, and its petition filed shortly thereafter is timely.

Next we address whether the City failed to bargain over a mandatory subject of

bargaining when it refused to negotiate over the implementation of the merit increases. It is an improper practice under NYCCBL §12-306(a)(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." Mandatory subjects of bargaining generally include wages, hours and working conditions and any subject with a significant or material relationship to a condition of employment. *District Council 37, AFSCME*, Decision No. B-35-99 at 12. Petitioner must demonstrate that the matter to be negotiated is a mandatory subject of bargaining. *Doctors Council, S.E.I.U.*, Decision No. B-21-2001 at 7.

It is well settled that the decision to grant merit increases and the aggregate amount thereof are within the scope of management's rights set forth in NYCCBL § 12-307b, and that the criteria and procedures for determining eligibility for merit increases are mandatory subjects of bargaining. *Civil Service Bar Ass'n*, Decision No. B-9-69 at 7, states:

> We conclude . . . , in line with the Supreme Court's decision in NLRB v. Katz, and the pertinent laws, regulations, and practices in City employment, that the procedures and criteria to be applied in determining eligibility for merit increases are within the scope of collective bargaining, but that the decisions whether or not to grant increases, and the aggregate amount thereof, are within the City's discretion, with the individual amounts to be determined by the City in accordance with the negotiated criteria and procedures.

*See Patrolmen's Benevolent Ass'n*, Decision No. B-4-99 (procedures to determine increases given to police officers were mandatory subject of bargaining, despite the City's labeling the increases as "bonuses for special assignments."); *United Probation Officers Ass'n*, Decision No. B-44-86.

The Union's request here was to bargain over the criteria and procedures for determining ACS employees' eligibility for merit increases and not the decision to grant merit increases or the

aggregate amount. Therefore, the Union has established that its demand to bargain concerned a mandatory subject of bargaining.

We are not persuaded by the City's claim that the Union waived its right to bargain over the procedures and criteria for granting merit increases. In *United Probation Officers Ass'n*, Decision No. B-38-89 at 26, we explained that a union waives its right to bargain when ". . . it can be said from an evaluation of the prior negotiations that the matter was fully discussed or consciously explored and the union 'consciously yielded' or clearly and unmistakably waived its interest in the matter" (emphasis added), *citing District Council 37, AFSCME*, Decision No. B-21-75 at 21, *aff'd, City of New York v. Board of Collective Bargaining*, No. 41993 (S.Ct. N.Y. Co. Mar. 18, 1976)(the impact of layoffs was determined to be within the scope of bargaining and, absent evidence that the subject had been fully discussed or consciously explored, the Board found no waiver of the right to bargain). Further, in *United Probation Officers Ass'n*, Decision No. B-44-86 at 18-19, we found that the union had not waived its right to bargain over officer safety issues relating to certain assignments merely because it had proposed, and then withdrawn, a pay differential demand for those assignments.

In this matter, the Union introduced its demand on merit pay in May 1998 in the course of collective bargaining. One portion of its demand sought to modify a general notice provision of the contract into a 30 day notice requirement. By the other two portions of its demand – to bargain criteria for merit pay, and to include a no discrimination clause -- the Union sought to make its existing statutory rights into contractual rights as well. Prior to the next bargaining session, the parties had two "labor-management meetings" during which they discussed the City's intention to create the new job titles which would be subject to merit-based performance

awards. On June 24, 1998, when the parties next met for bargaining, the Union withdrew its proposal on merit pay, leaving exactly the same general notice provision that appeared in the parties' expired agreement. The City essentially asks us to find that the mere withdrawal of the Union's proposal at the conclusion of negotiations was also a waiver of the Union's statutory bargaining rights under the NYCCBL. As to the portions of the demand not related to notice of intent to award merit pay, we cannot conclude from the Union's ultimate withdrawal of the demand unaccompanied by any modification to the contract's provisions, that the parties fully discussed the portions of the demand reciting its statutory rights, or that the Union explicitly relinquished its statutory rights to bargain these matters. The pleadings contain no factual assertions as to the nature, scope or duration of any negotiations over that demand to the extent that they allegedly occurred. The Union's conduct did not clearly and/or unmistakably demonstrate that it waived its statutory right to bargain on these subjects. Furthermore, the language of the parties' contract provision requiring notice of the City's intention to grant merit increases does not, on its face, demonstrate that the Union waived its statutory right to bargain over criteria and procedures for granting merit increases or establish that the City exhausted its bargaining obligation on this issue.[4]

The City's reliance on *Correction Officers Benevolent Ass'n*, Decision No. B-21-81, is misplaced. In that case, the union claimed that the City had refused to negotiate over compensation relating to a change in the officers' reporting location. This Board found that shortly after the implementation of the new reporting location, the union had the opportunity to

[4] We do not reach the issue as to whether there was a waiver of the Union's right to bargain or whether the City had exhausted its duty to bargain concerning the first part of the Union's proposal – the demand for the 30 days notice.

make a compensation proposal in formal contract negotiations, but failed to do so. As a result, the Board was unwilling to allow the filing of an improper practice to substitute for a demand for bargaining, and found that the Union had *de facto* waived its right to bargain. Here, the Union's claim – the unilateral implementation of merit increases – did not arise until the City announced its granting of the increases, well after formal contract negotiations concluded.[5] Until the Union had knowledge that implementation of the merit pay was imminent, the Union did not have the obligation to demand bargaining over the criteria and procedures for implementing merit increases.

Finally, we reject the City's claim that since the criteria and procedures for implementing the merit increases are the same as those used for performance evaluations, a management right, the City had the right to unilaterally implement the merit increases. The City's choice to apply the same criteria to eligibility for merit increases as it does to performance evaluations does not transform what is otherwise a mandatory subject of bargaining to a non-mandatory one. Rather, the City must negotiate with the Union concerning the criteria and procedures for implementing the merit increases, regardless of the criteria it desires to use to determine eligibility.

Based on the above, we hold that the City breached its duty to bargain in good faith in violation of §12-306(a)(1) and (4) of the NYCCBL when it refused to negotiate concerning the criteria and procedures for granting merit increases.

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[5] Although, the record shows that the City announced it's intention to grant merit increases to the new employee titles as early as January 1998, and created procedures for implementing merit pay in May 2000, it did not act to implement merit pay until April 2001.

**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 Social Service Employees Union, Local 371, AFSCME, AFL-CIO, docketed as BCB-2207-01, be, and the same hereby is, granted; and

ORDERED, that the City cease and desist from unilaterally implementing merit pay; and

ORDERED, that the City bargain with Social Service Employees Union, Local 371, AFSCME, AFL-CIO over criteria and procedures for implementing merit increases.

Dated: July 9, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

ERNEST F. HART
MEMBER

BRUCE H. SIMON
MEMBER

GABRIELLE SEMEL
MEMBER