DC 37 v. HRA, DOT & City, 69 OCB 35 (BCB 2002) [Decision No. B-35-2002 (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-

NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and CITY OF NEW YORK,

Respondents.
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Decision No. B-35-2002
Docket No. BCB-2273-02

DECISION AND ORDER

On March 14, 2002, District Council 37 ("Union") filed an improper practice petition alleging that the City of New York, the Human Resources Administration, and the Department of Transportation ("City" or "HRA" or "DOT") violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union claims that the City unilaterally changed the terms and conditions of employment of certain DOT Custodial Assistants and Debris Removers when their employment status was converted from per annum to per diem. The City responds that these individuals are part of a program to help public assistance recipients make the transition from temporary to permanent employment and that they were inadvertently classified by DOT as per annum instead of per diem employees until the error was discovered and corrected. Since there is no dispute that the City may classify these

individuals as per diem and because the terms and conditions of employment for per diem employees have already been negotiated and have not been changed, we find that the Union has failed to present a matter within the scope of collective bargaining. Accordingly, the petition is dismissed.

BACKGROUND

In 1996, with the enactment of the Welfare Reform Act, the federal government created Temporary Assistance to Needy Families ("TANF"). Under TANF, single parents with dependent children may receive Medicare, food stamp vouchers, monetary assistance and/or rent vouchers for up to five years. December 2, 2001, was projected to be the first date that TANF recipients would no longer be eligible for these benefits.

The New York City Administrative Code ("Admin. Code"), Title 21, Chapter 5, requires, *inter alia*, that the City establish a transitional job program to create temporary employment in the public sector and provide eligible participants with education, training, and career related services to enhance their ability to secure permanent employment after completing the program. Pursuant to Admin. Code § 21-502(a), individual participation in the program is for a period not to exceed 12 months.

According to the City, in February 2001, HRA began to promulgate a list of TANF recipients who were approaching their December 2, 2001, benefits cut-off deadline in order to assess who could be temporarily employed under the City's Job Opportunity Program ("JOP"). The goal of HRA is to screen and assist eligible TANF recipients to obtain job skills and work experience in order to gain permanent employment while providing City agencies with temporary

employees at no cost. The wages paid to JOP participants are reimbursed by HRA through federal and New York State TANF funding sources. JOP participants are paid the prevailing entry level wage for the job title they work in.

A number of City agencies including DOT and the Department of Parks ("Parks") participated in JOP. It is undisputed that the Union met with representatives from the City of New York Office of Labor Relations and Parks to discuss JOP. It is unclear from the record when the meeting occurred, who was present, and what was discussed.

In June and July 2001, HRA assigned a group of JOP participants to DOT to fill temporary positions as Custodial Assistants, to perform such tasks as cleaning public spaces. In August and October 2001, HRA assigned another group to DOT to fill temporary positions as Debris Removers, to perform such tasks as removing debris from vacant lots and roadways.

It is undisputed that when the JOP Custodial Assistants and Debris Removers were processed by DOT during their intake appointment, they were informed that their employment would be for six months and that there was no guarantee of permanent employment once their six month tenure was completed. The record does not indicate if these participants were told whether they would be per annum or per diem employees.

According to the City, DOT mistakenly entered the JOP participants into its payroll system as per annum instead of per diem employees. The per diem employee designation is a budget classification, and, as such, they are not counted as part of the agency's "headcount" for budget purposes. In October 2001, the City of New York Office of Management Budget ("OMB"), which is responsible for developing the Mayor's budgets and advising agencies on issues affecting their fiscal stability, contacted DOT regarding the increase in personnel of more

than 80 people. OMB observed that the increase had occurred during a Citywide hiring freeze and had not been approved, as required. DOT informed OMB that the increase was the result of its participation in JOP and was not due to an increase in its budgeted personnel. As per OMB's instruction, DOT corrected the "administrative error" by changing the JOP participants' employment status from per annum to per diem.

By memorandum dated November 19, 2001, DOT advised its JOP participants that their employment status had been changed to per diem and explained the guidelines for determining their vacation, sick leave, overtime, and holiday pay. DOT JOP participants would no longer receive overtime pay but instead would receive compensatory time and, unless scheduled to work, they would not be paid for a holiday. Moreover, their vacation and sick leave would be now based on the number of hours worked per month. Employees who had already received holiday pay and cash overtime were not required to refund these monies. The Union alleges that the City never notified it of these changes and seeks an order that, *inter alia*, the City restore the terms and conditions of employment the DOT JOP participants had prior to the unilateral change and that it pay them the value of wages or time lost as a result of this action.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that in violation of NYCCBL § 12-306(a)(4), the City unilaterally changed the terms and conditions of employment of certain DOT Custodial Assistants and Debris Removers when their employment status was converted from per annum to per diem. The City changed these terms and conditions without bargaining over such mandatory subjects as holiday

leave, annual and sick leave accrual, and overtime pay. The Union argues that it is the City's burden to demonstrate that an "administrative error" can shield it from its bargaining obligation.

City's Position

The City argues that it did not change the terms and conditions of the DOT JOP participants' employment. These individuals were initially advised that their employment with DOT was temporary. Due to an "administrative error," they were inadvertently entered into DOT's payroll system as per annum rather than per diem employees. Correcting this error did not alter the terms and conditions of their employment established prior to their hiring. Parks uses the per diem designation for its JOP participants, who are also represented by the Union, and the Union was therefore familiar with the per diem designation.

As a second defense, the City claims that the Board lacks jurisdiction over this matter. The City argues that "Federal and State TANF funding sources mandate how a participating employer, including a city agency, pay the wages of the temporary JOP employees hired under this program. . . " (Answer ¶ 62.) The limited amount of government funding can subsidize individual JOP participants for a period of six months only. Thus, the City was obligated to comply with federal and state rules and procedures, and issues concerning these subsidies should be settled under these laws and not the NYCCBL.

DISCUSSION

As a threshold matter, we address the City's defense that the Board lacks jurisdiction to hear this claim because federal and state law mandates how the City must pay JOP participants. While claims of alleged violations of federal and state law are external to the NYCCBL, and a

thus beyond the jurisdiction of this Board, *Gillard*, Decision No. B-35-2001 at 7, the City has failed to identify or provide the Board with a copy of the "rules and regulations" that it claims are controlling.[1] Moreover, the issue here is not the length of JOP participants' employment or how they are to be paid. Instead, the issue is whether the City was required to bargain over terms and conditions of employment when it changed the employment status of DOT JOP participants from per annum to per diem. Pursuant to NYCCBL § 12-309(a)(4), the Board has the power and duty "to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter." Accordingly, we deny the City's jurisdictional defense.[2]

Pursuant to NYCCBL § 12-306(a)(4), it is an improper practice 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, Locals 2507 and 3621,* Decision No. B-35-99 at 12. A petitioner alleging a refusal to bargain in good faith claim 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.

We have held that the classification or assignment of employees to a civil service title,

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[1] By letter dated June 19, 2001, the Board requested that the City provide it with a copy of these rules. To date, there has been no response.

[2] To the extent the Union is claiming the City has not complied with Admin. Code § 21-501 *et seq.* in that it "calls for jobs of 12 months duration wherein employees holding City titles will enjoy the same terms and conditions of employment as 'regular' employees" (Reply ¶ 44), the Board lacks jurisdiction to consider such a violation.

absent demonstration of improper motive, is not an improper practice. *Kane*, Decision No. B-59-88 at 11, *aff'd sub nom. Kane v. MacDonald*, No. 24115 (S. Ct. N.Y. Co. June 27, 1989), *aff'd,* 161 A.D.2d 305, 555 N.Y.S.2d 81 (1st Dep't 1990). Here, the Union states that it is not asking the Board "to alter the payroll status of these employees, or make their positions more than temporary." (Reply ¶ 50.) Nor does the Union argue that the City does not have the right to classify JOP participants as per diem employees or that their re-classification was based on an improper motive. Rather, the Union claims that "[t]he simple fact of the matter is that this group of workers enjoyed one set of terms and conditions when they began their employment, and later had those terms and conditions changed." (Reply ¶ 54.) Essentially, the Union argues that the City failed to bargain over the change in the terms and conditions of the DOT JOP participants' employment that resulted from the conversion, prior to converting their status from per annum to per diem. Since the change in the terms and conditions of employment was a consequence of the DOT JOP participants' change in status, which is not in dispute, and the parties have already bargained the terms and conditions of per diem employees, the Union's request for bargaining is denied.

We take notice that the Citywide Agreement, which was negotiated by the parties and covers the titles of Custodial Assistants and Debris Removers, addresses overtime, holiday pay, vacation and sick leave and that the manner in which these items are calculated depends on the status of the employee in question. The Citywide Agreement defines the term "employee" as "a full-time per annum worker, unless otherwise specifically indicated herein." The term "per diem employee" is undefined. However, Article I, § 5, sets forth some of the terms and conditions of employment of per diem employees, who, unlike per annum employees, do not receive 12 paid

holidays and certain other benefits until they have completed 18 months of service. Moreover, under Article V, § 19, per diem employees' accrual leave credits are calculated pursuant to an agreed-upon formula.

The Union does not allege that the City changed or failed to comply with the relevant terms of the Citywide Agreement governing per diem employees. Moreover, the Union does not argue that the manner for calculating DOT JOP participants' overtime, holiday pay, vacation and sick leave is based on anything but the existing contract language. Because the Union does not dispute the City's right to classify DOT JOP participants' employment status as per diem, and there has been no change in the terms and conditions governing per diem employees, the Union has failed to present a matter within the scope of collective bargaining. Absent any allegation of improper motive, the City's right to classify the DOT JOP participants' employment status encompasses the right to correct an error and reclassify them as per diem employees. Here, there is no basis for this Board to order the City to restore per annum terms and conditions of employment to employees who are now classified as per diem. Accordingly, the petition is dismissed.

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-2273-02 be, and the same hereby is denied in its entirety.

Dated: New York, New York
October 30, 2002

MARLENE A. GOLD
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