City v. PBA, 73 OCB 21 (BCB 2004) [Decision No. B-21-04 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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Decision No. B-21-2004
Docket No. BCB-2395-04

DECISION AND ORDER

On April 7, 2004, the City of New York ("City") filed a verified improper practice petition against the Patrolmen's Benevolent Association ("Union" or "PBA"). The City alleges that the Union violated § 12-306(b)(2) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by engaging in "surface bargaining" tactics and by filing a Declaration of Impasse with the Public Employment Relations Board ("PERB") when no such impasse existed. The Union contends that the appropriate forum is PERB and the matter is moot because the parties are at impasse. We dismiss the petition as moot because PERB has declared that the parties are at impasse and implicit in that declaration is a determination that bargaining has been exhausted.

BACKGROUND

The City and the PBA were parties to a collective bargaining agreement ("Agreement") that expired on July 31, 2000. On September 4, 2002, a public arbitration panel established terms and conditions of employment for the period August 1, 2000-July 31, 2002.

On September 8, 2003, the parties commenced negotiations for a successor Agreement. During the first two bargaining sessions, the parties presented their initial proposals. On December 2, 2003, the City argued that some of the PBA's proposals were nonmandatory subjects of bargaining. The PBA disagreed. On December 29, 2003, the parties continued to discuss the issues.

On February 4, 2004, the PBA presented a salary proposal. On February 19, 2004, when the parties met for the sixth time, the City stated that the PBA's salary proposal would be a total cost increase to the City of 33.56%. The PBA disagreed with the costing methodology.

At the last bargaining session, on March 1, 2004, the parties discussed, among other issues, the City's proposals for a new duty chart for police officers and for ways to generate economic savings. The City suggested that at the next meeting the parties should discuss technical issues. The PBA indicated that it would get in touch with the City.

On March 5, 2004, the PBA sent a letter to the Commissioner of the Office of Labor Relations ("OLR") indicating that the parties were "deadlocked" and that the Union would invoke the assistance of PERB. Three days later, the PBA filed a Declaration of Impasse with PERB. On April 7, 2004, the City filed the instant petition.

On May 13, 2004, PERB assigned a mediator to facilitate further negotiations between the parties. In a letter dated May 17, 2004, to the Office of Collective Bargaining, the PBA

stated that because the case was at impasse, the petition was rendered moot and should be dismissed.

The City filed an objection with PERB, arguing that PERB's appointment of a mediator was premature because the parties did not have sufficient opportunity for meaningful bargaining. In response, on July 8, 2004, PERB issued a decision, *Patrolmen's Benevolent Ass'n*, Case No. M2004-024, affirming the appointment of a mediator. By letter dated July 14, 2004, the PBA again urged the Board to dismiss the instant petition.

On August 25, 2004, PERB declared that the parties were at impasse and designated a three-person public arbitration panel to determine terms and conditions of employment for police officers in the City of New York.

The City requests that the Board issue an order: (1) finding the PBA to have breached its obligation under the NYCCBL to bargain in good faith; (2) requiring the PBA to meet for negotiations with a sincere resolve to reach agreement; and (3) directing the PBA to withdraw its Declaration of Impasse filed with PERB.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union breached its duty to bargain in good faith in violation of NYCCBL § 12-306(b)(2)[1] by failing to "invest the necessary energy and commitment normally

[1] NYCCBL § 12-306(b)(2) states, in relevant part:
It shall be an improper practice for a public employee organization or its agents:
* * *
(2) to refuse to bargain collectively in good faith with a public employer on matters
(continued...)

spent by parties" to reach agreement, by using "surface bargaining" tactics, and by declaring an impasse and seeking assistance from PERB when no such impasse exists.

According to the City, the Union has sought to frustrate negotiation efforts in order to declare impasse at the earliest opportunity and have the dispute resolved by an arbitration panel. First, the Union has delayed providing requested information to the City. Second, the Union has never provided proposals on alternate duty charts for police officers even though the committee overseeing the subject met many times. Third, although the parties met for only seven bargaining sessions, the Union announced to the Commissioner of OLR that the parties were "deadlocked."

The City asserts that the instant petition should not be dismissed because the City's improper practice claim is independent from the Union's request for impasse procedures with PERB. The instant petition addresses the PBA's improper actions in violation of the NYCCBL, an area over which the Board has jurisdiction.

Union's Position

The Union asserts that the appropriate forum is PERB. PERB's appointment of a mediator, affirmed by a PERB decision, validates the PBA's declaration of impasse. Because the case is now appropriately at impasse, the Union requests that the Board dismiss the instant improper practice petition.

DISCUSSION

We find that the City's claim that the Union breached its duty to bargain in good faith

[1](...continued)
within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer. . . .

under the NYCCBL is moot because PERB has concluded that bargaining was exhausted and declared that the parties are at impasse.

The Court of Appeals has applied the doctrine of mootness when "a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy." *Matter of Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach,* 98 N.Y.2d 165, 172 (2002). Both this Board and PERB have found issues raised in an improper practice charge moot when a change in circumstances eliminates the underlying controversy and the policies of statutory law are not served by further consideration of such a charge. *Patrolmen's Benevolent Ass'n,* Decision No. B-22-79 at 2; *City of Peekskill,* 26 PERB ¶ 3062 (1993).

Here, we find that the underlying controversy has been rendered moot by PERB's conclusion that the parties are at impasse. To declare an impasse, this Board and PERB must find that collective bargaining negotiations between a public employer and a designated employee organization have been exhausted. N.Y. Civil Service Law Article 14 § 209-1; NYCCBL §12-311(c)(2). *See City of Newburgh,* 15 PERB ¶ 3116 (1982) (PERB defined an impasse as "a situation in which there was no reasonable expectation that further negotiations would be fruitful without third-party assistance."). Here, PERB's declaration of impasse necessarily means that the parties bargained to exhaustion.

The gravamen of the City's complaint is that the PBA filed a Declaration of Impasse at PERB when no such impasse existed and before the parties had engaged in meaningful bargaining. PERB considered these objections when the City filed an exception to PERB's appointment of a mediator, and PERB responded by affirming the appointment. After mediation

proved unsuccessful, PERB declared that the parties were at impasse and appointed a public arbitration panel. Since PERB determined that the parties had bargained to exhaustion, the question whether the parties bargained in good faith has been rendered moot. Moreover, were we to address the merits of the case and find that the Union engaged in surface bargaining, the only remedy would be to send the parties to bargaining, a remedy wholly inconsistent with, and rendered irrelevant by, PERB's determination of impasse. Since the petition is moot, we need not address the parties' other arguments.

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, BCB-2395-04, filed by the City of New York, be, and the same hereby is, dismissed in its entirety.

Dated: December 13, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

BRUCE H. SIMON
MEMBER

ERNEST F. HART
MEMBER