City v. Podiatry Soc. Of NYS, 9 OCB 23 (BCB 1972) [Decision No. B-23-72]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Impasse

-between- DECISION NO. B-23-72

THE CITY OF NEW YORK DOCKET NO. BCB I-1-72

-and-

THE PODIATRY SOCIETY OF
THE STATE OF NEW YORK

DETERMINATION AND ORDER

This case represents the first appeal of an impasse panel Report and Recommendations rejected by the parties and subject to the finality procedures of the New York City Collective Bargaining Law as amended in January , 1972.

On April 5, 1972 petitioner, the Podiatry Society of the State of New York ("the Society") the collective bargaining representative for a bargaining unit representing podiatrists employed by the New York City Health and Hospitals Corporation requested the appointment of an impasse panel, negotiations between the Society and the City of New York for a renewal of the collective bargaining agreement between them having reached an impasse. Benjamin Wolf, Esq. was thereafter duly appointed by this Board as a one-man impasse panel on May 15, 1 972; a hearing was held on July 20, 1972; and Mr. Wolf's Report and Recommendations were delivered to the parties on September 27, 1972.

Various requests were made, and granted for extension of time both as to the publication of the Report and Recommendations and as to acceptance or rejection of the Report and Recommendations by the parties. On October 24, 1972 the Society reported to the Office of Collective Bargaining its rejection of the Report and Recommendations. On October 27, 1972 the Office of Labor Relations accepted the Report and Recommendations. On November 9, 1972 the Society appealed the Report and Recommendations to the Board of Collective Bargaining alleging that the Report and Recommendations were based upon errors of fact and/or judgment, and requested a further hearing on the matter. The answer of OLR was filed on November 24, 1972.

The duty of the Board of Collective Bargaining in impasse appeals is defined in §1173-7.0 c(4)(f) of the New York City Collective Bargaining Law:

> "A final determination of the Board . . . shall be binding upon the parties. Such a final determination shall constitute an award within the meaning of article 75 of the civil practice law and rules."

In addition, the Revised Consolidated Rules of the Office of Collective Bargaining declare in Part 5:

> "After issue has been joined, the Board may determine the matter on the papers and briefs filed or prior to making such determination may direct the holding of oral argument or hearing or may make such other disposition of the matter as it deems appropriate and proper."

In its review of I-86-72 the Board has relied on the available transcripts, and all relevant exhibits. It has also weighed the testimony of spokesmen and the witnesses in the 1970 and 1972 impasse cases, as well as the Society's brief and in the 1068 impasse.

The rationale and basis of the panel's recommendations are summed up in the following:

> "From the foregoing, it is apparent that podiatry, while pressing to achieve a status of parity has not yet achieved it and to grant the podiatrists parity as far as salaries are concerned at this point, in my opinion, would be premature despite the fact that in many cases their fee schedule is the same.
>
> The flow chart of salary relationship between podiatrists and clinicians and dentists in the City reveals that the podiatrist has moved from $6.50 an hour in 1964, when the clinician and dentist were getting $9.20 per hour, to $11.90 in 1971 when the comparable rate for clinician was $13.30. In those seven years, the podiatrists have moved from 70% of the clinicians' salary to 89%.
>
> Until the podiatrists have been accepted by hospital administrations and the general public as the equal of dentists if not clinicians they are not entitled to move any closer to the salary paid the clinician and dentist. The clinicians and dentists were awarded an increase of $3.20 during-a three-year contract for 1971-74. By my computation, 89% thereof is $2.85."

The allegations made by the Society in support of its request fall into the following three main categories:

1. That certain judgments and conclusions of the panel, incidental to the Report and Recommendations are, according to

the Society, unwarranted by or contrary to the testimony and evidence before the panel;

2. That the panel failed to consider certain evidence, notably the record of proceedings of a 1968 impasse panel, which the Society maintains were a necessary and intended part of the record in the instant impasse; and

3. That despite the evidence allegedly before the panel and conclusions drawn by the panel which were consistent with that evidence, the panel's recommendations were at odds with both the evidence and the panel's conclusions.

We have considered the Report and Recommendations and on their face they appear to be internally consistent and valid. However, we have also examined the Report and Recommendations in the light of the Society is allegations and have made the following findings:

1. The first general category of allegation made by the Society maintains that the panel made erroneous conclusions as to differences in internship requirements for podiatrists on the one hand and clinicians and dentists on the other; as to dentistry attracting more promising students than podiatry; and as to the scope and importance of treatment

rendered by podiatrists. We find that even if so established, these conclusions are not sufficiently consequential to prejudice or impeach the Report and Recommendations. We find that the inquiry of the panel was wide ranging and that its Report and Recommendations are well reasoned and broadly based and amply justified by the record before the panel.

2. We find that the Society's contention that the panel erred in failing to consider the 1968 "transcript" is without merit for there was no "transcript." Moreover, the Society having an interest in the consideration of this material, including its brief and exhibits, had the primary duty of assuring that it was included in the record and made available to the panel. In any case, the most relevant of the 1968 documents - the 'Report and Recommendations - was before the impasse panel here. We have examined that portion of the record in question which is available and which was submitted to us by the Society. We

find that all of this material was available, to the parties; that substantially the same subject areas were dealt with in the instant proceeding; and that the 1968 material would at best have constituted corroboration for the testimony and evidence actually offered and for the most part would have been essentially cumulative. Since it all dealt with the question of parity with dentists and clinicians and the progress achieved generally by podiatrists in that direction and since the panel found that such progress had been made, we do not see that the Society's case was in any way disadvantaged by the absence in the record of any of the 1968 material. The point which this evidence would have sought to establish is recognized by the panel on the basis of other evidence that was in the record. The panel nevertheless found that on the entire record, the result which the Society sought on the basis of this point was not justified.

3. The Society maintains that since the panel concedes that progress has been made by

> podiatrists toward professional parity with dentists and clinicians between 1970 and 1972 the panel erred in not adjusting the 89% ratio of podiatrists' salaries to dentist/clinician salaries which has prevailed since 1969. We do not consider that any such error has been demonstrated. The panel's Report and Recommendations are based upon the entire record, including other material evidence on that issue, and not on that single point alone.*

Our discussion of the salient points upon which the Association's appeal is based does not include any observations as to different or alternative findings that might have been reached nor has our examination of the record herein been conducted with any such underlying purpose. Section 1173-7.0c(4) of the New York City Collective Bargaining Law, the statute which authorizes proceedings such as the one before us reads, in pertinent part, as follows:

> (b) The notice of appeal shall specify the grounds upon which the appeal is taken, the alleged errors of the panel, and the modifications requested. The board shall afford the parties a reasonable opportunity to argue orally before it or to submit briefs, or may permit both argument and briefs. Review of the recommendations shall be based upon the record and evidence made and produced before the impasse panel and the standards set forth.

* e.g. see excerpt from the Report and Recommendations on page three supra.

> in subparagraph (b) of paragraph three of subdivision c of section 1173-7.0 of this chapter, provided, however, that when an appeal is taken to the board on any of the grounds of prejudice set forth in subparagraphs (i), (ii) or (iii) of paragraph one of subdivision b of section seventy-five hundred eleven of the civil practice law and rules, review shall also be based upon the record made in any hearing which the board may direct on such issues, provided, however, that the board orders such hearing within thirty days of the filing of, the notice of appeal.

We interpret this section of the law as creating a form of appeal procedure and not as warranting de novo proceedings following the rejection of an impasse panel's Report and Recommendations; in fact, it may be said that the concept of review is inconsistent with that of hearing de novo except in extraordinary circumstances. We do not conceive it to be our function in such proceedings to substitute our judgment, in determining the facts and adjudicating the merits, for that of an impasse panel. Our principal statutory responsibility is to examine the record to det ermine whether the parties have been afforded a fair hearing and whether the record provides substantial support for the result reached by the impasse panel; if it does, the fact that an interested party or that the Board might be able to conceive other results is not controlling. If the impasse panel has afforded the parties full and fair opportunity to submit testimony and evidence relevant to the matter

in controversy; unless it can be shown that the Report and Recommendations were consideration were not based upon objective and impartial entire record; and unless clear evidence is presented on appeal either that the proceedings have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law, the Report and Recommendations must be upheld. We believe that to be the case here. We find and conclude:

> that the panel afforded the parties ample opportunity to present their respective cases and that any absence of evidence in the record is attributable to the parties and not to the panel and that ground as well as the ground of substantiality, which we have discussed, do not constitute a basis for appeal;
>
> that the panel demonstrates in its Report and Recommendations that the same is based upon a balanced and well reasoned consideration of the entire record before the panel;
>
> that the panel did not abuse its discretion nor misapply the facts or rule in a manner inconsistent with the evidence and that its Report and Recommendations are free of such substantial and material errors of fact and/or law as would warrant any further action by this Board; and
>
> that the Report and Recommendations of the impasse panel herein should be affirmed.

Our order herein will be in conformity with these findings and conclusions.

0 R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law and in accordance with the findings and conclusions of this Board herein above set forth, it is

ORDERED, that the appeal of the Podiatry Society of the State of New York of the Report and Recommendations of the impasse panel herein be, and the same hereby is, dismissed; and it is further

ORDERED, that the said Report and Recommendations of the impasse panel herein, a copy of which is annexed hereto and made a part hereof, be, in all respects, and the same hereby are, affirmed.

Dated: New York, New York
December 11, 197-2

ARVID ANDERSON
Chairman

ERIC J. SCHMERTZ
Member

WALTER L. EISENBERG
Member

HARRY VAN ARSDALE, JR.
Member

EDWARD SILVER
Member

THOMAS HERLIHY
Alternate Member

NOTE: Labor Member
William Michelson did
not participate in this
decision.

Office of Collective Bargaining

In the Matter of the Impasse

between

THE CITY OF NEW YORK

and

THE PODIATRY SOCIETY OF THE STATE OF NEW YORK

REPORT and RECOMMENDATIONS

Of

IMPASSE PANEL

Re: Podiatrists (Part-Time)
Case No. I-86-72

On May 15, 1972 the Office of Collective Bargaining determined that an impasse existed in the collective bargaining between the Podiatry Society of the State of New York, herein after referred to as the Society, and the City of Now York, hereinafter referred to as the City, and designated the undersigned as a one-member impasse panel to hear and report and make recommendations for the resolution of the dispute.

A hearing was hold at the Office of the Office of Collective Bargaining on July 20, 1972 at which the parties were given full opportunity to present testimony, evidence and argument in support of their respective positions. The City was represented by Robert Pick, Assistant Director of Labor Relations. The Society was represented by Blindor, Steinhaus & Hochhauser, Attorneys Albert A. Blinder, of counsel. Also present at the hearing were the following:

For the City: Michael Davies, Personnel Examiner
Dr. Tibor Fodor, Executive Medical Director of the Medical Assistance Program.

For the Society: Gilbert Hollander, Executive Director
S. G. Frank, Vice-Chairman, New York State Board of Podiatry
Herbert Rauscher, Podiatrist in Charge at Kings County Hospital

The dispute is concerned with salary and related matters for the positions of podiatrist (part-time) to apply for the period July 1,1971, to June 30. 1971. The standard rate for podiatrist (part-time) has been $11.90 per hour since April 1, 1971.

The Society asserts that there exists a basic parity between podiatrists, physicians and dentists which warrants they be treated the same in respect to salary and other benefits.

The City recognizes that podiatry has made great strides in recent yea in its effort to obtain recognition of its scope and function but the City argues that the podiatrist has not yet reached the stage where it can be considered the equal of the physician and the dentist.

At the hearing, the Society presented evidence, exhibits and arguments to support its claim to parity. It pointed out that podiatry is one of the four health professions (medicine, osteopathy, dentistry and podiatry) receiving doctor degrees and licensure by the State of New York. To obtain a license a podiatrist must have obtained a doctoral degree and must pass examinations in the following subjects: anatomy, microbiology, chemistry, physiology, diagnosis, pathology, surgery, therapeutics I and II, (including pharmacology), podiatric surgery, and podiatric orthopedics. It maintains that these requirements are similar to those for dentistry, medicine and osteopathy.

The Society points out that podiatrists graduating from the New York College of Podiatric Medicine in the last five years have had baccalaureate degrees before entering and therefore have had eight years of college and professional training. Podiatrists are listed and recognized by all state agencies and insurance companies throughout the State. The fees they receive for the care of patients is similar to that received by physicians. The United Medical Services (New York's Blue Shield) defines practitioners in its contracts as, "Physicians, Dentists, Podiatrists". The fee schedule for all three under its contracts is identical. Similarly, scheduled insurance policies which provide specified fees make the same allowance for treatment given by physicians podiatrists.

The provisions of the New York State Employees Health Insurance Plan cover dentistry and podiatry in identical language. A similar equality is recognized by the Workmen's Compensation Board the Disability Benefits Law, the State

Department of Social Services and the City Social Service Department.

Testimony was offered by Dr. Seymour Frank, Vice. Chairman of the New York State Board of Podiatry and former President of the Podiatry Society of the State of New York, by Dr. Herbert Rauscher, Podiatrist in Charge of Kings County Hospital, and by Gilbert Hollander, Executive Director of the Society, supporting the Society's case for equal treatment with doctors and dentists.

The City submitted the testimony of Dr. Tibor Fodor, Executive Medical Director of the Medical Assistance Program, who felt that podiatry, while important, could not compare in scope, extent and significance with the practice of medicine. The physician, in his view, is trained for the whole body while podiatry is essentially concerned with a patient's feet. The physician Must e decisions at the time of emergency that affect the person's life or death. This is not true of podiatry. Dr. Fodor pointed out that a podiatrist becomes a practitioner as soon as he finishes school while a physician Must intern. From his conversation with podiatrists, Dr. Fodor stated that 75% to 90% of their daily work has to do with corns and calluses. Podiatrists are supposed to treat anything and everything that pertains to the foot, but if they find that the condition is of a systemic nature they Must refer it to a physician Dr. Fodor acknowledged that there were surgical podiatrists but they are not in the same class with medical surgeons.

Dr. Fodor testified that, in his opinion, dentists have to know more than podiatrists. A dentist in called upon to recognize a great many systemic diseases. While a podiatrist may also be called upon to recognize some, in his opinion, the number that are recognized in the mouth are considerably greater than in the foot. Dr. Fodor acknowledged that podiatry and dentistry were apparently equal in pre-professions training and in the absence of an internship

requirement but he stated that the training of dentists, although equal in time, was much deeper in scope than that of podiatrists.

Dr. Rauscher, testifying in rebuttal to Dr. Fodor, pointed out that the foot is the furthest part of the body from the heart and by virtue for that distance is more prone to all the problems involving circulatory disturbances. Hence, diabetes is a particular concern of the podiatrists. The foot as the single organ for locomotion and weight-bearing is the foundation of the skeletal system and is particularly system and is particularly confronted with all types of arthritis. Gout affects only the foot. The foot is the place with greatest strain on muscles, ligaments and tendons. Skin deceases which affect any portion of the body also affect the foot but many skin contact deceases are localized in the foot.

Dr. Raucscher challenged that any one part of the body ca be singled out in terms of its impact on the general well-being of the person. While no attempting to diminish the dentists' roll in the helping to maintain general health, he argued that the podiatrists' concern with feet is or equal importance.

Having studied the transcript of the present hearing as well as that conducted in 1970 and *he exhibits submitted by the parties, I have come to the following conclusions about the issue of parity between podiatry, medicine and dentistry. In comparison with the physician, the training, scope and significance of the podiatrist is clearly lesser. The principal reason is that the physician is responsible for the whole person and for life and death decision while the podiatrist is concerned with one Dart of the body and must refer all systemic problems to a doctor. While a podiatrist may take a similar course of study these studies do not approach the scope and depth to which a physician is exposed. A doctor is subject to an internship after graduating from medical school, while a podiatrist can become a practitioner immediately upon graduation. It is becoming customary for podiatrists to take internships after graduation

but at present only about 50% do. In the past, podiatry was a second or third choice after failure to obtain admission to a medical or dental school. This is less so now as podiatry is becoming more generally recognized for its Scope and function. In the part podiatrists have not been permitted to admit the patients into hospitals although this is changing and in some hospitals podiatrist are now permitted to initiate admissions under the supervision of a physician, but the physician remains responsible for the systemic condition of the patient. Podiatrists have not generally been accepted in the operating room although this, too, is changing.

While the superiority of the physician over the podiatrist is clearly demonstrated, the case for the dentist is less clear cut although in my opinion dentistry must be accorded a higher status at the present time. Podiatry is still a lower choice of aspiring, professionals although this is changing. To the extent that it is still true, dentistry attracts on the average more promising students but no one can say with any degree of confidence that the average dentist is a better practioner than the average podiatrist. With respect to training and requirement for licensure, the course of study is similar. It was the impression of Dr. Fodor that the dentist's training was deeper in scope than that of the podiatrist but he made no definitive study thereof. With respect to the relative number of systemic deceases and conditions for which the dentist is trained as compared with the podiatrist the impression I have from the testimony is that the dentist stands higher but this is an opinion and not demonstrated in any depth so as to persuade one with conviction.

Dr. Fodor's testimony that the podiatrists spend the major part of their day on corns and calluses was not challenged. This concentration on minor afflictions of the feet shows that the more serious functions of the podiatrists are not known to the general public. People do not go to podiatrists for all foot problems as they do to dentists with all tooth problems. In the main, people go to their-physicians for foot problems other than corns and calluses.

The recent amendment of the definition of podiatry in Section 7001 of the Education Law sponsored by the Society indicates the limitations of the practice. Section 7001 defines it as "operating on the bones, muscles and tendons of the feet for the correction of <u>minor</u> deficiencies and deformities of a mechanical and functional nature. - - - treating <u>simple</u> and

uncomplicated fractures of the bones of the foot; administering only local anesthetics - - - treating under general anesthesia administered by authorized persons - - -" (emphasis added).

From all this, I am led to the conclusion that podiatry may be approaching the scope and significance of dentistry but has not as yet reached its status. There is no doubt that in the past few years the state requirements with respect to podiatry both as to training and practice has been strengthened. It is also true that strides have been made in recognition of podiatry by hospital administrations. Thus, the manual for hospitals of the Joint Commission on Accreditation permits the governing board of a hospital, after considering
the recommendations of their medical staff to grant privileges to "qualified, licensed podiatrists, in accordance with their training , experience and demonstrated competence of judgement." It permits a podiatrist with clinical
privileges to initiate procedure for admitting patients with the concurrence of an appropriate member of the medical staff. Since 1970, new programs have been instituted at several of the City hospitals giving improved status to podiatrists
but it is not generally granted elsewhere. At Kings County Hospital, Dr. Rauscher testified, there has been great progress made last year. Podiatrists now service the Home Care Departments and they have petitioned the Medical Board to propose a change in the by laws which makes podiatry a separate division in the Department of Surgery. He testified that they have just gotten through the paper work and framework of the new constitution at Kings County Hospital.
The changes have been authorized by a large majority of podiatrists practicing at the hospital, but he also admitted that the change has not yet taken place. (Transcript, p. 27).

From the foregoing, it is apparent that podiatry, while pressing to achieve a status of parity has not yet achieved it and to grant the podiatrists

parity as far as salaries are concerned at this point, in my opnion, would be premature despite the fact that in many cases their fee schedule is the same.

The flow chart of salary relationship between podiatrists and clinicians and dentists in the City reveals that the podiatrist has moved from. $6.50 an hour in 1964, when the clinician and dentist were getting $9.20 per hour, to $11.90 in 1971 when the comparable rate for clinician was $13.30. In those seven' salary to 89%.

In my opinion, until the podiatrists have been accepted by hospital administrations and the general public as the equal of dentists if not clinicians they are not entitled to more any closer to the salary paid the clinician and dentist. The clinicians and dentists were awarded an increase of $3.20 during a three-year contract for 1971-74. By my computation, 89% thereof is $2.85. Accordingly, I recommend as follows:

1. That the contract be renewed for another three years.

2. That the salary for podiatrists be increased at the beginning of the first year 70¢ per hour; at the beginning of the second year $1.075 per hour; at the beginning of the third year $1.075 per hour.

3. The differential paid for the designation as Chief of Section shall remain at 34.00 per session for the year beginning July 1, 1971, but shall be raised to 35-00 per session for the year beginning July 1, 1972, and July 1, 1974.

4. Other differentials shall remain unchanged.

Dated: September 25, 1972

BENJAMIN H. WOLF-IMPASSE PANEL