CWA v. City, 9 OCB 7 (BCB 1972) [Decision No. B-7-72 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of
COMMUNICATIONS WORKERS OF AMERICA
AFL-CIO, DECISION NO. B-7-72

Petitioner DOCKET NO. BCB-89-71

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION, ORDER AND DETERMINATIONS

On April 14, 1971, Communications Workers of America filed a petition pursuant to Rule 7.3 of the Consolidated Rules of the Office of Collective Bargaining alleging that during its contract negotiations with the City for a unit of administrative titled personnel a disagreement had arisen over the negotiability of two demands advanced by the union a training fund, and a Prohibition against the lateral transfer of non-administrative-titled employees into the union The City declined to bargain on these subjects, contending that they were not mandatory subjects of collective bargaining. The Union, therefore, requests that the Board of Collective Bargaining make a final determination as to whether these matters are mandatorily within the scope of bargaining, and whether they must be submitted to an impasse panel as have other mandatory items in dispute. An impasse panel was designated on March 5, 1973. and made its report on July 6, 1971, on all issues save those of the training fund and lateral transfers, which had been held in abeyance pending the Board's determination of the negotiability of these subjects.

The Union's prior contract, which ran from January 1, 1969.0 to December 31, 1970, contained clauses covering both a training fund (Art. 12) and a prohibition of lateral transfers (§6 of Appendix B, Supplemental Agreement covering certain employees in the Department of Social Services, dated April 25,1969).

The City's answer to the Union's petition denies that the Union's demands are mandatory subjects of bargaining, and asserts that there is no obligation on its part to bargain on either ct these demands because the matter ci a training fund is a permissive or voluntary subject of bargaining, and the matter of a lateral transfer is a prohibited -- or at least a permissive -- subject of bargaining.

In a letter dated June 24, 1971, the Union added the further contention that the City, by refusing to negociate on the Law subjects which had been part of the prior expired contract, had violated §1173-7.0 c. (3) (d) of the New York City Collective Bargaining Law (Preservation of status quo). It also requested that it be permitted to present oral argument to the Board. The cited section of the status quo provision of the NYCCBL provides as follows:

> "During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending thirty days after it submits its report, the public employees organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public

> employer shall retrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights oi public employers other than their right to make such unilateral changes, or than the rights and duties of public employees and employee organizations under state law. For the purpose of this subdivision the term 'period of negotiations' shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed."

The parties submitted briefs and further clarified their position at a conference en August 25, 1971. The initially contended that the City contravened the status quo provision by refusing to negotiate on the two subjects contained in the expired contract but later contended that the City's cessation cf training fund programs during the negotiation period and the suspension of the prohibition against lateral transfers during that period bad violated §1173-7.0 c (3) (d) of the NYCCBL.

The Union's contentions and the City's responses raise three principal issues:

1. Is a training fund demand by the Union to provide additional training and education beyond those provided by the Department oi Personnel, and to provide preparation for advancement and upgrading, within the scope of bargaining?

2. Is a demand by the Union for a prohibition against lateral transfers into unit titles within the scope of bargaining?

3. Did the City violate the "Preservation of status quo" provision by unilaterally changing wages and working conditions during the status quo period?

The Training Fund Demand

The training fund provision in the expired contract sought by the Union to be continued and included in the new agreement reads as follows:

> "For the term of this contract, the City agrees to allocate a fund equal to $20 for each employee covered by this contract.
>
> "The fund shall be used to provide additional training and educational opportunities beyond those presently provided by the Department of Personnel, designed to increase the effectiveness and efficiency of employees covered by this contract, and to prepare them for advancement and upgrading.
>
> "The City Department of Personnel will develop, conduct, administer, coordinate and evaluate all training programs initiated pursuant to this contract. The Department of Personnel shall consult on a regular and continuing basis with the Union on its plans for all such programs, and the Union will participate in the selection and recruitment of employees receiving such training."

The Board, in Decision No. B-04-71 (Matter of the Association of Building Inspectors and Housing and Development Administration) determined that a demand for a training fund to provide tuition and released time "manifestly falls within the areas reserved to management" and "therefore involves a voluntary or permissible, not a mandatory, subject of collective bargaining." The Board further declared:

> "As such, it may nor be submitted to the impasse panel without the consent of the City or proof of a 'practical impact' on the employees, not here claimed or established. . . . The voluntary nature of the subject is not altered by the fact that training funds are provided in collective bargaining agreements with other unions and that general provisions concerning
>
> such funds are contained in the City-

> wide contract covering matters which must be uniform for all Career and Salary employees. As stated in Decision B-11-68 (Matter of Social Service Employees Union), 'The fact that such agreement (on a voluntary-subject) has been reached and included in a contract cannot transform a voluntary subject into a mandatory subject * * * for the latter is fixed and determined by law.'"

In the instant case the Union seeks to distinguish its demand for a training fund from that involved in Decision No. B-4-71. It asserts, inter alia, that its proposal calls for training on employee time only; that, unlike the Building Inspectors, CWA did have-a training fund in its preceding contract; that the City, during the bargaining for a training fund in the earlier contract negotiations, had not indicated that it was bargaining on the issue voluntarily, and hence should now be stopped from so maintaining; and that the rescission of the training fund program would disadvantage its members who must compete in promotional examinations against members of other unions who receive free preparatory courses under existing contractual training funds.

We adhere to our holding in Decision No. B-4-71 that training, funds, per se, are a permissive matter of bargaining, and find no weight in the circumstances advanced by the Union for modifying that holding in the instant case. A training fund demand impinges upon the management right of the City to "determine standards of service to be offered by its agencies;

. . . maintain the efficiency of governmental operations; . . . determine the methods, means and personnel by which government operations are to be conducted; . . . and to exercise complete control and discretion over the technology of performing its work." § 5c, Executive Order 52. The City has the management right to determine the quantity and quality of the ser vices to be delivered to the public, and, therefore, also the quantity and quality of the training required to achieve that service. Whether the training is on
employee time or released time, and whether or not the
City explicitly states during negotiations that it considers a subject a voluntary one, cannot alter the nature of the subject matter if, as a matter of law, it is an exercise of a management prerogative. Moreover, if a subject is a permissive or voluntary subject of bargaining, the City may properly elect to bargain on it with one union and not with another. The exercise of such discretion in the absence of discriminatory motivation designed to interfere with the rights of employees under the NYCCBL or to discredit the Union does not, in our view, make the City's conduct inherently discriminatory so as to constitute a per se violation of the NYCCBL.

The Demand for a Ban Against Lateral Transfers

The lateral transfer clause in the expired contract which the Union sought to include in the new agreement reads as follows:

> "The City agrees that employees in non-administrative titles shall not be laterally transferred to titles covered by this agreement."

The reason for this demand in 1969 was the Union's fear that the reorganization of the Department of Social Services would result in wholesale lay-offs of Case Workers and Supervisors (represented by another union) who could then be laterally transferred, pursuant to Rule 6.1.9 of the Civil Service Commission's Rules and Regulations, to administrative-titled positions represented by CWA, thus creating it a severe threat to the security and career advancement of the administrative-titled employees."

Rule 6.1.9, which was adopted by the Civil Service Commission in 1969, and which is described as "a landmark change in the administration of the civil service,"[1] provides for an exception to the rule (Rule 6.1.1) which forbids transfers to a different title without a competitive examination. It permits a permanent employee in a competitive position to request a transfer to another title if he personally meets all the requirements for a competitive examination in the other title.

[1] Personnel Policy and Procedure Bulletin Issue No. 4-71, Department of Personnel, April 15, 1971.

Then, if no preferred or promotion lists for the other title exist, and the basic salary range is not appreciably higher than his present title, and if the releasing and receiving City agencies join in the employee's request for the transfer; and if the Civil Service Commission ascertains that other employees will not be adversely affected to a degree outweighing the benefits gained, the employee requesting the lateral transfer will be given a non-competitive examination for the other title. The clause in CWA's expired contract, and its present demand, would prohibit such lateral transfers of non-administrative employees into administrative titles represented by CWA.

The Union maintains that the subject of prohibiting lateral transfers into the bargaining unit is a mandatory one because it was included in the expired contract and because the City did not indicate in the prior bargaining that it regarded the subject to be a permissive one. It alleges that a similar clause is included in a contract with another union.

The City takes the position that the subject of banning lateral transfers is a prohibited subject, or, at the very least, a voluntary or permissive subject of collective bargaining. it maintains that the clause prohibiting lateral transfers was included in the earlier contract because the City then believed it to be a voluntary subject, but that this erroneous belief cannot transform a prohibited subject into a voluntary or a mandatory one. The City further contends that the subject is in-fact a prohibited or unlawful matter because any agreement by the City not to make lateral transfers into the unit would

violate the Civil Service Rule authorizing such transfers; would restrict the rights of individual employees (not necessarily in the bargaining unit) to obtain lateral transfers; and would restrict the powers delegated-to City agency heads to request lateral transfers.

We find the subject of a ban on lateral transfers not a mandatory subject as the Union maintains, nor a prohibited subject as the City urges, but a voluntary or permissive subject of collective bargaining.

To bargain on this subject would not involve the breach of "an obligation or duty fixed by law" and therefore is not a prohibited-subject. (City of New York and Social Service Employees Union, Decision B-11-68). The ban on lateral transfers sought by the Union does not abridge the authority of the Civil Service Commission (which does not initiate lateral transfers) by compelling either approval or disapproval of such a transfer; it merely obligates the City not to request such a transfer of the Commission, which, in the absence of such request, has nothing to act upon. The City's agreement not to seek lateral transfers into unit titles, is no more than a waiver by the City of its managerial. discretion to request such transfers. Nor does Rule 6.1.9 confer on an employee an enforceable right to demand a lateral transfer; it merely gives-a competitive class employee an "eligibility" for such transfer, which becomes realized only when the City, in its discretion, requests the transfer, and only after the Civil Service Commission, having approved the request, gives the employee a non-competitive examination.

But if the subject of prohibition of lateral transfers is not a prohibited subject, neither is it a mandatory subject, for it clearly encroaches on the City's managerial right to "determine standards of selection for employment, maintain the efficiency of government operation, determine the methods, means and personnel by which government operations are to be conducted, and exercise complete control and discretion over the organization and the technology of performing its work." Accordingly, we determine that the subject of a prohibition of lateral transfers is a voluntary subject of bargaining which may be negotiated only on mutual consent, and, likewise, may be submitted to an impasse panel only on mutual consent.

The Violation of the Status Quo Provision

In a recent decision, (District Council No. 1 - Pacific Coast-District Marine Engineers' Beneficial Association, AFL-CIO, Decision No. B-1-72), the Board, interpreting the meaning and purpose of the status quo provision of the NYCCBL, concluded that during the period prescribed by the section the parties to an expired contract are prohibited from unilaterally changing any condition created by the prior contract. Our holding underscored the realistic view that, in the field of public employment relations, "the denial of the power to strike is balanced by the maintenance of the status quo." The Board, however, realizing that different factual circumstances necessarily require different results, reserved the right "to determine in future cases, based upon the clear intent of the parties and the special nature of the circumstances involved, that a particular term or condition of employment expired with the term of the contract."

In the instant case we find that the training fund provision and the ban-on-lateral-transfers provision of the expired contract, although voluntary subjects of bargaining, nevertheless continued, by operation of the statute, in full force and effect during the status quo period.

The question then remains whether the City, by its actions during the status quo period, unilaterally altered the surviving conditions and thus violated Sec. 1173.7.0 c (3) (d) of the NYCCBL.

The Union does not charge that the City took any steps to make lateral transfers into administrative positions during the status quo period. Indeed, it concedes that the City did not in fact seek to make any such lateral transfers despite its refusal to negotiate a ban on lateral transfers in the new contract. Accordingly, we shall dismiss the Union's charge in this respect.

As to the training fund provision which survived the expiration of the contract, we find that the material set forth in the pleadings is insufficient to permit a finding that the City violated the status quo provision of the NYCCBL. An analysis of the expired contractual provision warrants no definite conclusion at what intervals and in what amounts funds were to be allocated by the City to the training fund. Nor has the Union satisfactorily shown what training programs, if any, the City declined to set up or implement during the status quo period. Accordingly, though we find that the training fund provision was in

force and effect during the status quo period by operation of statute, the Board, nevertheless, denies the Union's petition, with leave to the Union, however, if it claims that the training fund condition was in fact violated, to file an application to the Board, with notice thereof to the City, for the appointment of a Trial Examiner to hear, report, and make recommendations to the Board with respect to these matters, including an appropriate remedy.[2]

DETERMINATIONS AND ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that the Union's demand for a training fund is a voluntary subject of collective bargaining; and it is further

DETERMINED, that the Union's proposal for a prohibition against lateral transfers is neither a prohibited subject nor a mandatory subject, but rather a voluntary subject of bargaining; and it is further

ORDERED, that the Union's petition charging that the City violated §1173-7.0 c (3) (d) of the NYCCBL by discontinuing the ban on lateral transfers during the status quo period be, and the same hereby is, denied; and it is further

ORDERED, that the Union's petition charging that the City violated §1173-7.0 c (3) (d) of the NYCCBL by suspending the training program during the status quo period be, and the same hereby is, denied, without prejudice, however, to the Union filing a petition, if so desired, with this Board, with notice thereof to the City, for the designation

[2] In Dec. B-1-72 (District No. 1-Pacific Coast District Marine Engineers' Beneficial Assn., AFL-CIO, and the City of New York), the Board stated that in all cases arising under the status quo provision it will exercise jurisdiction on a case by case basis in determining the means to be employed in dealing with specific controversies. Here we find it appropriate to deal with the underlying controversy by assigning the matter to a trial examiner, if the petitioner so requests.

of a Trial Examiner to hear and report to this Board all of the relevant facts and circumstances regarding the alleged breach of the City's obligation with respect to the training fund program during the status quo period and to recommend to the Board an appropriate remedy, and it is further

ORDERED, that the Union's request for oral argument before-the Board be, and the same hereby is, denied.

DATED: New York, N.Y.
March 15, 1972

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC. J. SCHMERTZ
M e m b e r

EDWARD SILVER
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