L.854, UFO v. City, 57 OCB 10 (BCB 1996) [Decision No. B-10-96 (INJ)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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IN THE MATTER OF THE APPLICATION
FOR INJUNCTIVE RELIEF

-between-

UNIFORMED FIRE OFFICERS
ASSOCIATION, LOCAL 854, IAFF
AFL-CIO,

DECISION NO. B-10-96(INJ)

Petitioners,

DOCKET NO. BCB-1812-96(INJ)

-and-

THE CITY OF NEW YORK,

Respondents.
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DECISION AND ORDER

On February 22, 1996, pursuant to § 12-306 of the New York City Collective Bargaining Law ("NYCCBL"), the Uniformed Fire Officers Association ("UFOA," "Union" or "petitioner"), filed a verified improper practice petition against the City of New York ("City" or "respondent"). The petition alleges that the City violated a duty to bargain by implementing unilateral changes in its substance abuse policy which is applicable to members of the UFOA bargaining unit. These members include Fire Officers in the ranks of Lieutenant, Captain, Battalion Chief, Deputy Chief, Supervising Fire Marshal and Administrative Fire Marshal.

On February 26, 1996, pursuant to § 209-a(5) of the New York State Civil Service Law, the Union filed a verified petition for injunctive relief against the City alleging that irreparable injury will result from the City's refusal to bargain over the unilateral changes alleged in the underlying improper practice petition.

On February 27, 1996, the City sought the Union's consent to a one-week extension of time to file a response to the petition for injunctive relief. The Union opposed the request, and, on February 28, 1996, the City filed a verified answer to the petition for injunctive relief, opposing the Union's request for injunctive relief and maintaining that the petition fails to satisfy the two-pronged test required by the law and our rules.

Although entitled to do so under the Title 61, Chapter 3 of the Rules of the City of New York (the "OCB Rules"), the Union did not file a reply.

BACKGROUND

On February 1, 1996, the Fire Department of the City of New York ("Department") implemented All Units Circular 202R/Subject: Substance Policy: Drugs/Alcohol ("AUC 202R 2/1/96"), applicable to members of the UFOA bargaining unit. Prior to the implementation of AUC 202R 2/1/96, several circulars existed concerning drug/alcohol testing; these include a substance abuse policy with respect to alcohol (AUC 202R 6/9/88), a substance abuse policy with respect to drugs (AUC 202A Revised 10/23/85), subsequent addenda to these policies, and a sample collection and clinical testing procedure dated 5/1/91. The text of the 2/1/96 circular appears to be different in many respects from the text of earlier circulars, procedures and addenda.

One difference in language concerns a change from a previously stated requirement of "reasonable grounds" to warrant testing, to the definition of

several specific grounds which enumerate, for the first time, specific events which will trigger drug/alcohol testing.[1]

Another apparent difference is that the newly promulgated circular sets out in detail the disciplinary consequences for a positive alcohol/drug test, including, inter alia, termination for a first offense where a tenured member tests positive for illegal drug use. Procedures in effect prior to February 1, 1996, did not specify but only alluded to the possibility of disciplinary action following a positive test.[2]

A third apparent difference between the circulars is found in collection procedures and conditions for retesting. Whereas prior to February 1, 1996, a member had to be accompanied to the gender-appropriate restroom for a testing personnel to witness the collection procedure, this requirement is not specified in AUC 202R, 2/1/96. However, AUC 202R 2/1/96 does outline other specific procedures not detailed in earlier circulars or addenda, e.g., the member may be assigned to administrative duty pending test results. Also, the new circular requires that, if a member whose specimen tests positive for illegal drugs desires a retesting of the specimen by a laboratory other than the one which conducted the test for the Department, the member's request must

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[1] AUC 202R 2/1/96 also imposes random testing on Fire Marshals (Uniformed). However, the UFOA bargaining unit does not include employees in this title; they are in another unit represented by a different union. The unit represented by the UFOA does include employees in the higher-level civil service titles of Supervising Fire Marshal and Administrative Fire Marshal.

[2] The emphasis in the earlier procedures was on referral to treatment programs with disciplinary action taken only after the member had been unsuccessful in treatment. Addendum No. 1 to AUC 202R and 202AR, November 18, 1988.

be made in writing, and the retesting must be performed by a laboratory chosen from a list of licensed laboratories, and further that the member pay for the retesting.

One further difference in testing procedures is that AUC 202R 2/1/96, states that an inability to produce a specimen is to be deemed a refusal to obey an order. Prior to the promulgation of this circular, such a failure to produce a specimen within a reasonable period of time was deemed a positive result.

Positions of the Parties

Union's position

The petitioner contends that the circumstances under which drug testing is to be imposed on bargaining unit members and the drug testing procedures themselves constitute mandatory subjects of bargaining. Further, the Union contends that unilateral implementation of disciplinary standards, penalties and procedures by a public employer is also prohibited. The UFOA asserts that, by letter dated January 29, 1996, it demanded bargaining with the City over the proposal to implement new or different standards, penalties and procedures for violations of the substance abuse policy. At the same time, the Union said that it demanded deferral of the implementation of the penalty and disciplinary procedure provisions pending collective bargaining. Despite its demands, the Union maintains that AUC 202R 2/1/96 was promulgated in fact on February 1, 1996, in violation of the City's duty to bargain under the NYCCBL and the New York State Civil Service Law, Article 14 (the "Taylor Law").

The petitioner seeks injunctive relief, contending that, without it, irreparable injury will result from the City's refusal to bargain over proposed disciplinary standards, penalties and procedures and the imposition of mandatory drug testing. The petitioner argues that the harm will occur in two respects: (1) the mandatory drug testing will infringe upon privacy interests, and (2) the City's unilateral implementation of mandatory drug testing and disciplinary standards, penalties and procedures, if permitted to remain in place for the duration of the processing of the underlying improper practice petition, would establish the policies as a fait accompli. The petitioner further asserts that "[t]hat policy becomes the backdrop against which all future negotiations proceed and is not remedied by the Board's subsequent direction that the City must bargain."

The petitioner maintains that the City's unilateral action, if permitted to stand, would make a mockery of the NYCCBL and the bargaining obligations which it imposes on the City. The Union urges the Board, "not the UFOA alone," to seek injunctive relief in the Supreme Court of the State of New York, so that "the City's bargaining obligations imposed by [the NYCCBL] are [not rendered] meaningless and unenforceable." The Union maintains that, absent interim injunctive relief and expedited processing by the Board, irreparable damage to the collective bargaining process and representation rights will result. Without it, the petitioner continues, the Board will be unable to render effective relief to the UFOA and members of its bargaining unit when it decides the underlying improper practice petition.

City's Position

As to the Union's claim that drug testing procedures have been changed by the implementation of AUC 202R 2/1/96, the City raises a timeliness defense. It notes that a notice of examination for promotion to the title of Fire Marshal (Uniformed), dated April 21, 1993, stated that employees in the title would be tested for drug use at various times. In the City's view, "the Union should at that point have demanded bargaining over the impact of the decision to randomly test the Fire Marshals." Since the underlying improper practice petition was filed beyond the applicable four-month limitations period, the City argues, the Union's claim is untimely. As to the allegation of a change in procedures, the City continues, "Only with respect to the random testing of Fire Marshals, of which the Union was aware much earlier, and the schedule of penalties, did the revised policy differ from those earlier policies."

As a general statement, the City does not dispute the Union's contention that drug testing procedures are a mandatory subject of bargaining. However, as to Fire Marshals, the City contends that the "level of responsibility involved in their law enforcement duties weighs heavily in favor of finding [a] decision to implement random drug testing of the title not to be mandatorily negotiable." The City urges a balancing test in which "the scale should tip in favor of the employer's interest in a drug-free Fire Marshal work force" as opposed to an employee's privacy interest.

In any event, except for employees in the title of Fire Marshal (Uniformed), the City denies that either the testing procedures or the circumstances under which drug testing is imposed have been changed by the revised policy. The City asserts that sample collection and clinical testing

procedures have remained unchanged for nearly five years, and employees' rights vis-a-vis retesting samples have remained unchanged for at least as long. "Such retesting provisions had actually been in existence in a slightly different form since 1988," the City continues. "Accordingly, the actual testing methods and practices, addressed by Section 7 of the substance policy, were not changed on February 1, 1996."

The City disputes the Union's assertion that disciplinary procedures, where such are provided for by local law, are within the scope of mandatory collective bargaining under the NYCCBL. It asserts that decisions to impose discipline and to determine a penalty are managerial prerogatives reserved to management under NYCCBL § 12-307(b). The City maintains that this is particularly true where local law, e.g., the New York City Administrative Code,[3] provides for disciplinary procedures. Respondent observes that the Civil Service Law provides for disciplinary procedures as well.[4] In any event, the respondent states that, under AUC 202R 2/1/96, there has been no change in the procedures to be followed when discipline is imposed from those procedures specified in either the applicable collective bargaining agreement, Civil Service Law, or the New York City Administrative Code. As to the penalties to be imposed under AUC 202R 2/1/96, the City maintains that the policy simply lists penalties which the Fire Department will seek through the

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[3] Title 15 (Fire Prevention and Control), Ch. 1 (Fire Department), § 15-113 (Discipline of members; removal from force).

[4] Ch. 15, as amended, Article V (Personnel changes), § 75 (Removal and other disciplinary action).

disciplinary procedures already established under the Civil Service Law and the Administrative Code.

Further, the City contrasts the bargainability of discipline under the NYCCBL with that under the Taylor Law. It asserts that NYCCBL § 12-307(b) has been construed to reserve to management the right to initiate discipline under a given set of circumstances. The City further avers that "the penalty, or type of discipline to be imposed under a certain set of circumstances, cannot be separated from the right to initiate discipline without rendering such managerial right meaningless."

As to the Union's contention that it apprised the City of its position on these issues on January 29, 1996, the City asserts that notification actually came one day later. In any event, the City states that, by letter dated January 18, 1996, Lillian Rivera-Inzerillo, Director of the Fire Department's Office of Labor Relations, informed UFOA President Richard D. Brower that the Department intended to promulgate the substance abuse policy at issue herein on or about February 1, 1996. The City maintains that its notification complied with the parties' collective bargaining agreement which requires that "[n]o less than 2 weeks notice of [a program] change is to be given to the Union" and "[w]ithin the two weeks the Union is to be given an opportunity to discuss the changes with the City." The City further asserts that the Union "refused to offer a comprehensive response" to the City's request for comments and questions about the proposal. In addition, the City admits that the Union demanded that implementation of the penalty and "disciplinary procedure" provisions of the policy be deferred pending collective bargaining but, in response, the City reasserts that disciplinary

procedures are not a mandatory subject of bargaining and that there has been no unilateral change in disciplinary procedures.

The City does not deny that the policy was promulgated on February 1, 1996, but it denies that the policy changed matters which are encompassed within the mandatory scope of bargaining. It alleges that "nearly all of the provisions included in the substance abuse policy issued on February 1, 1996, had been included in the previous formulations of the drug and alcohol policies[]" and that the policy at issue "merely represented a consolidation and restatement of such previously extant policies." For this reason, the respondent asserts that the petitioner is not entitled to injunctive relief on the grounds that it has not established reasonable cause to believe that there is a likelihood of success on the merits of the claim that the City has failed to bargain over a mandatory subject of bargaining. Further, the respondent contends that the Union's claim that irreparable injury will result absent injunctive relief is speculative and unsupported by the facts.

DISCUSSION

Section 209-a.5 of the Civil Service Law ("CSL") does not empower this Board to issue preliminary injunctions; that power continues to reside in the courts. What the law does is to give the courts jurisdiction to consider applications for injunctive relief in improper practice cases where there has been a finding by this Board that the statutory standard has been satisfied.

Both Section 209-a.5 of the CSL and Section 1-07(l)-(u) of the OCB Rules set forth what is essentially a two-part standard that a petitioner must meet in order to be authorized by this Board to seek injunctive relief in the

courts. The standard, which we first explained in Decision No. B-1-95(INJ), requires that a petitioner show that:

> (1) there is reasonable cause to believe that an improper practice has occurred,[5] and
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> (2) it appears that immediate and irreparable injury, loss or damage will result thereby, (i) rendering a resulting judgment on the merits ineffectual, and (ii) necessitating maintenance of, or return to, the status quo to provide meaningful relief.[6]

With these principles in mind, we turn to the allegations before us.

Public employers and employee organizations have a statutory duty, under Section 12-307a. of the NYCCBL, to bargain on all matters concerning wages, hours and working conditions, i.e., mandatory subjects of bargaining. Section 12-306a.(4) of the NYCCBL makes it an improper practice for a public employer

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[5] In evaluating the first prong of this test, we will carefully examine the improper practice claim to insure that it has a likelihood of success. That does not mean that the improper practice charge must be definitively proven at this early stage of the process of adjudication; nor does it mean that we must, at this stage, resolve all factual disputes that may be material to the merits of the charge. What it does mean is that upon a review of the record before us, we must be able to find reasonable cause to believe that an improper practice under the NYCCBL has occurred. In making this determination, we will consider whether documentary evidence or other convincing proof has rebutted mere allegations in a pleading; but we will not permit a bona fide dispute as to material facts to negate the sufficiency of a prima facie claim of improper practice. See Decision Nos. B-1-95(INJ); B-12-95(INJ).

[6] In evaluating the second prong of the above test, our inquiry will focus on examining whether, on the record before us, claims of irreparable harm are supported by apparently bona fide allegations of probative fact, or are doubtful or merely conclusory, or are otherwise legally insufficient. We will also examine whether there appears to be a causal connection between the alleged irreparable harm and the specific acts which are alleged to constitute an improper practice under the NYCCBL. Id.

to refuse to bargain in good faith on matters within that framework. A similar prohibition against an employer's refusal to bargain with the certified bargaining representative can be found in §209-a.1(d) of the Taylor Law. It has been held, under both statutes, that a unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith, and, therefore, an improper practice under the applicable statute.[7]

The Union alleges, essentially, that the promulgation of AUC 202R 2/1/96, constitutes a unilateral change in terms and conditions of employment since it sets forth a new substance abuse policy, including new or different standards, penalties, and procedures for violations of said policy. The City, on the other hand, denies that either the testing procedures or the circumstances under which drug testing is imposed have been changed by the revised policy. In light of the uncontroverted documentary evidence that drug and alcohol testing in some form and under some circumstances has been an ongoing practice in the Fire Department, the issue presented by the Union's petition is not whether the decision to test is a mandatory subject of bargaining. Rather, the issues raised are whether the procedures used to implement that decision, including the cirumstances under which tests are given, the procedures followed, and the consequences of a positive test are mandatory subjects of bargaining; and, if so, whether the issuance of AUC 202R 2/1/96 has brought about a unilateral change in those subjects.

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[7] Decision Nos. B-36-93; B-22-92; B-25-85; and B-6-82. See also: Village of Rockville Center, 18 PERB ¶3082 (1985); City of Batavia, 16 PERB ¶3092 (1983); and Board of Education, City of Buffalo, 6 PERB ¶3051 (1973).

In Nassau County Police Benevolent Association v. County of Nassau, 27 PERB ¶3054 (1994), the County unilaterally implemented drug testing procedures for police personnel. Pursuant to those procedures, officers were subject to drug testing only upon "reasonable suspicion" of drug abuse. Officers who either tested positive or refused to submit to testing were suspended and subjected to subsequent disciplinary action. In determining whether the County's implementation of its drug testing policy involved mandatory subjects of bargaining, PERB identified the employer and employee interests at issue:

> The County seeks to detect and prevent impairment of its police officers which can jeopardize safety and otherwise compromise the delivery of police services. The County also argues that the testing maintains and fosters the public's confidence in the police department. On the other hand, it is recognized in the ever-developing case law that drug testing by urine sampling is a demeaning and intrusive procedure, which triggers personal privacy issues of constitutional dimension. The outcome of those tests, accurate or not, can affect the employee's employment in several ways, and may affect the employee's reputation irrevocably.

PERB then balanced these interests and concluded that the procedures and disciplinary consequences associated with the drug testing policy were mandatorily bargainable:

> The County's interests relate only, or at least primarily, to the decision to subject employees to a drug test. They are not, however, so related to the implementation of that decision as to render the several separate implementation decisions equally nonmandatory in all respects. We cannot say that whatever managerial prerogatives may be associated, for example, with testing methodology, testing triggers (e.g., definition of reasonable suspicion), choice of laboratory, collection procedures, chain of custody, sample screening, conditions for retesting, reporting and recording of test results, due process protections, and disciplinary consequences, so outweigh the employees' collective and individual interests in these areas as to make them negotiable only at the County's option. We, therefore, find these procedures and consequences to be mandatorily negotiable.

In the present case, the parties dispute whether the promulgation of AUC 202R 2/1/96 constituted a change in the drug testing policy set forth in earlier circulars and procedures. The Union alleges that there was such a change; the City asserts that the new policy "merely represented a consolidation and restatement of such previously extant policies."[8] We find that the allegations of both parties on this issue are conclusory. Since the UFOA bears the burden of proof on its request for injunctive relief, it was incumbent upon it to allege with specificity exactly which provisions of AUC 202R 2/1/96 constituted changes from which particular provisions of the previously-applicable circulars. On the record before us, there are only two undisputed areas of change, which the City characterizes as follows:

> Only with respect to the random testing of Fire Marshals, of which the Union was aware much earlier, and the schedule of penalties, did the revised policy differ from those earlier policies.

We consider the first difference identified by the City, as well as its timeliness argument based thereon, to be irrelevant herein. As noted in footnote 1, supra, the UFOA bargaining unit does not include employees in the title Fire Marshal; they are in another unit represented by a different union. The unit represented by the UFOA does include employees in the higher-level civil service titles of Supervising Fire Marshal and Administrative Fire Marshal. There is no indication in the record whether random testing has been imposed on employees in the latter titles. Neither the UFOA's petition nor the City's answer alleges that this is the case. Accordingly, this is not an

[8] However, the City does acknowledge two new elements of AUC 202R 2/1/96, concerning random testing for Fire Marshals, and a schedule of disciplinary penalties. These matters are discussed infra.

issue with which we must be concerned in ruling on the instant injunctive relief request.

As to the institution of a schedule of disciplinary penalties, we observe that the procedures in effect prior to February 1, 1996 merely alluded to the fact that a positive test result may result in disciplinary action. In contrast, AUC 202R 2/1/96 sets forth the disciplinary consequences or "penalty guidelines" for a positive alcohol/drug test in detail. These consequences include, but are not limited to, termination for a first offense where a tenured member tests positive for illegal drug use; a penalty of "up to ninety days pay, two years of testing, [and] final warning for violations of alcohol or drug-related misconduct" for a first offense where a member tests positive for alcohol. Under PERB's decision in Nassau County Police Benevolent Association, the disciplinary consequences associated with drug testing are a mandatory subject of bargaining. However, we are constrained to agree with the City that given §15-113 of the Administrative Code and the Appellate Division's decision in City of New York v. Malcolm D. MacDonald, (Sup. Ct., N.Y. Co. 4/14/92); Modified, 607 N.Y.S.2d 24, 145 LRRM 2894 (1st Dep't 1994) Leave to Appeal Denied, 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994), there exists some doubt as to whether the disciplinary consequences are mandatorily bargainable under the circumstances of the present case. Accordingly, the apparent change in the disciplinary consequences cannot serve as a basis for a finding in this case that UFOA has stated an apparently meritorious claim of an improper practice.

The parties dispute whether the existing drug testing practices and procedures of the Department otherwise have been changed by issuance of AUC

202R 2/1/96. The record herein does not provide a sufficient basis for us to determine whether there have been any further changes and, if so, whether they are bargainable under the analysis used in the decisions of PERB cited above. Accordingly, we cannot say that "there is reasonable cause to believe that an improper practice has occurred" sufficient to warrant the extraordinary remedy of injunctive relief under § 209-a.5 of the CSL. In view of this finding, we need not reach the issue of whether there is sufficient evidence of irreparable harm.

For the reasons stated above, we will deny the petition for injunctive relief. However, in view of the seriousness of the issues raised, we will direct that the underlying improper practice petition be processed expeditiously so that we can make a prompt final determination thereof.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, and to §209-a.5 of the Civil Service Law, we hereby deny the petition for injunctive relief of the Uniformed Fire Officers Association docketed as BCB-1812-96 (INJ).

Dated: New York, New York
March 25, 1996

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

Dissenting* JEROME E. JOSEPH
MEMBER

Dissenting* ROBERT H. BOGUCKI
MEMBER