DC 37 v. OLR, 67 OCB 33 (BCB 2001) [Decision No. B-33-2001 (Physically taxing)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

As List Representative,

-and-

Decision No. B-33-2001
Docket No. BCB-2067A-99

THE MAYOR'S OFFICE OF LABOR RELATIONS,

As List Administrator,

Pursuant to Administrative Code Section 13-162(l)(7)(a)
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DETERMINATION

District Council 37, AFSCME, AFL-CIO ("D.C. 37" or "the Union"), in its role as List Representative for the official list of physically taxing positions, has requested that the Board direct the Mayor's Office of Labor Relations ("OLR" or "the City"), the List Administrator, to follow the statutory procedures under §13-162(l)(7)(a) of the New York City Administrative Code ("Administrative Code") for determining whether the titles Auto Body Worker, Automotive Service Worker, Senior Automotive Service Worker, and Oil Burner Specialist should be added to the physically taxing list. OLR objects to this request, alleging that it was untimely made and that, in any event, the Union has waived any right to object to the failure to include those titles on the physically taxing list. Because the Union waited more than 17 years to assert rights under the Administrative Code, the Board holds that the Union's request is untimely and must be denied.

BACKGROUND

A. The Law

The Employees' Retirement System provisions of the Administrative Code[1] grant certain rights and benefits to employees who serve in jobs that are described as "physically taxing positions."[2] Section 13-162(l)(7)(a) of the Administrative Code provides that when a position is created, modified, or re-titled, or where the duties of a position are changed, the "List Administrator" [OLR] "shall" file a notice of intention to determine the status of the position, *i.e.*, to state whether or not the position will be included in the official list of physically taxing positions. A copy of this notice is supposed to be mailed, by certified mail, to the union that is the "List Representative" [D.C. 37]. The union then has five days to file any objection to the proposed action. If the union objects, OLR must file an answer to the objection, and then the Board of Collective Bargaining "shall determine any dispute with respect to such objection."[3] The Board's determination is "final and conclusive and shall not be subject to question or review in any court or place whatever."

B. The Practice of the Parties

It is undisputed that OLR, for the last 30 years, has not filed or mailed the required notice when a position was created, modified, re-titled or changed. The City does periodically send a

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[1] Administrative Code, Title 13, Chapter 1.

[2] Such positions are defined as career pension plan positions that "by reason of their duties, as established pursuant to law, require heavy duty and extraordinary physical effort . . . ." Administrative Code §13-162(l)(2).

[3] Administrative Code §13-162(l)(7)(b).

copy of the complete physically taxing list to D.C. 37. The City contends that the Union never before has objected to this practice.

It has been the City's position, in meetings with the Union, that it would not add any new title to the list unless the new title was created to consolidate existing titles already on the list, or where the new title merely represented a change in nomenclature.

From 1993 through 1995, OLR and D.C. 37 participated in "updating" the list by exchanging letters that suggested corrections to the list. In 1995, OLR sent the Union a final list, to which no objection was made, and the list was thereafter published in the City Record. The parties considered further revisions thereafter, and OLR sent another updated complete list to D.C. 37 in January, 1998.

C. The Current Dispute

The title Auto Body Worker was certified to Local 246, SEIU, in 1978, and the titles Automotive Service Worker, Senior Automotive Service Worker, and Oil Burner Specialist were certified to that union in 1982. Those titles never have been included on the physically taxing list since their creation.

In April of 1999, Dennis Sullivan, Deputy Administrator of D.C. 37, wrote to OLR Commissioner James Hanley to request that the above titles be added to the physically taxing list. Hanley responded by letter, declining to make the requested additions.

By letter dated June 10, 1999, Sullivan wrote to OCB, asking that the Board direct the City to follow the procedures under Administrative Code §13-162(l)(7)(a) with respect to the issue of whether these titles should be added to the physically taxing list. Hanley wrote to OCB

on July 23, 1999, opposing the Union's request. Sullivan wrote to OCB in reply to Hanley's letter on December 9, 1999. Finally, Hanley wrote to OCB in response on January 10, 2000.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the Board should require OLR to comply with the Administrative Code procedure for determining whether a title should be placed on the official list of physically taxing positions, regardless of whether the City has complied in the past. D.C. 37 asserts that it never waived its right to object under the Administrative Code and that the Union did not have prior notice that the City was refusing a request to add these titles to the list.

OLR's Position

OLR argues that D.C. 37's request is untimely, inasmuch as it was submitted over 17 years after the titles in question were certified. The City also alleges that D.C. 37 was on notice, at least since 1993, that these titles were not included on the list, and never objected; nor did the Union object to the City's practice of not filing a notice as to each new title. Moreover, OLR asserts that the Union, by participating in the updating of the list, has waived any right to object to the failure to include the titles.

DISCUSSION

This Board's statutory role in determining disputes concerning the placement of positions on the physically taxing list is a unique aspect of our jurisdiction, inasmuch as it derives not from

the labor relations provisions of the New York City Collective Bargaining Law[4] or the Taylor Law,[5] but rather, from the Employees' Retirement System provisions of the Administrative Code.[6]

This is only the second time in our history that this Board has been asked to make a determination with respect to a physically taxing list dispute. In *District Council 37 v. McIver, Director of Labor Relations*,[7] a dispute arose over whether the newly-created title of Assistant Highway Repairer should be added to the list. The List Representative, D.C. 37, submitted the dispute to this Board. In earlier proceedings in that case, we rejected the City's argument that, in the past, such questions had always been resolved through collective bargaining, and directed the parties to use the procedure set forth in the Administrative Code. When the parties exhausted those procedures, they returned to this Board. In Decision No. B-22-82, we rejected the City's reiteration of the collective bargaining argument, disposed of another technical objection, and ordered a factual hearing on the question whether the title in question "requires heavy duty and extraordinary physical effort" within the meaning of the Administrative Code.[8]

Based upon the clear language of §13-162(l)(7) of the Administrative Code, and consistent with our holding in *District Council 37 v. McIver*, we find that the Administrative

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[4] Administrative Code, Title 12, Chapter 3.

[5] Public Employees' Fair Employment Act, N.Y. Civil Service Law Article 14.

[6] Administrative Code, Title 13, Chapter 1; *see* discussion at page 2, *supra*.

[7] Decision No. B-22-82.

[8] After issuance of the Board's decision, the dispute was settled before hearings were held.

Code provisions and procedures create rights that are not nullified by any contrary past practice. As we said in the earlier case,

> extra-statutory procedures and standards utilized by the parties could not have the effect of vitiating the statutory provisions or of relieving the Board of its duty under the provisions of [§§13-162(l)(7)(a)] to adjudicate issues as to additions to the list.[9]

However, one aspect of the present dispute is quite different from that which existed in the prior case. In that matter, the title in question had just been created. In contrast, here, the several titles in dispute were created and certified to Local 246, SEIU, between 17 and 21 years before the Union requested to add the titles to the physically taxing list.

Pursuant to Administrative Code §13-162(l)(7)(a), when a career pension plan position is created, modified or re-titled, the List Administrator must "promptly" file a notice of its intention to determine that the position will or will not be included on the list, and to serve a copy of that notice on the List Representative within five days thereafter. Once the notice is served, the List Representative may file an objection within five days. Any dispute between the parties shall then be submitted to the Board of Collective Bargaining for determination. The thrust of these provisions, read together, is that questions whether new positions are to be included on the list of physically taxing positions are to be resolved in an expeditious manner.

Section 13-162(l)(7)(a) the Administrative Code requires OLR to take certain actions at the time that a position is created, modified, or re-titled, or where the duties of a position are changed. However, where OLR fails to take the required action, a union that becomes aware of that failure cannot wait indefinitely to bring the matter to the attention of the List Representative,

[9] Decision No. B-22-82 at 2.

and the latter cannot delay unduly in making a demand upon OLR or in submitting the matter to this Board for determination.

The record in the present case shows that, while OLR certainly failed to comply with its responsibilities as List Administrator under the Administrative Code, the certified employee organization, Local 246, SEIU, and the List Representative, D.C. 37, knew, or should have known, for a number of years, that the titles in question were in existence and had not been added to the list of physically taxing positions. It is not disputed that OLR periodically sends a copy of the complete physically taxing list to D.C. 37, and that during the period from 1993 through 1995, OLR and D.C. 37 participated in "updating" the list by exchanging letters that suggested corrections to the list. In 1995, OLR sent the Union a final list, to which no objection was made, and the list was thereafter published in the City Record. Thereafter, suggestions for further revisions to the list were raised by the parties through an exchange of correspondence, and in January, 1998, OLR sent D.C. 37 another updated complete list. No evidence has been submitted to show that the unions made any reference to the titles of Auto Body Worker, Automotive Service Worker, Senior Automotive Service Worker, and Oil Burner Specialist during any stage of that "updating" process. Four years after the "updated" list was published in the City Record, and more than a year after the latest revision was supplied to the Union, the Union first requested that OLR add these titles to the physically taxing list. We find that, under these circumstances, the request was untimely. Accordingly, the Union's request is hereby denied.[10]

[10] Nothing contained in this decision should be construed to limit the statutory obligations of the List Administrator or the rights of the List Representative contemporaneous with the time

ORDER

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

ORDERED, that the request of District Council 37, AFSCME, AFL-CIO, as List Representative, for an order directing the Office of Labor Relations to comply with the provisions of Administrative Code §13-162(l)(7)(a) with respect to the titles of Auto Body Worker, Automotive Service Worker, Senior Automotive Service Worker, and Oil Burner Specialist, be, and the same hereby is, denied.

Dated: New York, New York
July 19, 2001

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

EUGENE MITTELMAN
MEMBER

I concur with affirmation of the procedure but dissent regarding the denial in this case.

GABRIELLE SEMEL
MEMBER

I dissent.

VINCENT BOLLON
MEMBER

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that any position is created, modified, or re-titled, or where the duties of a position are changed.