City v. DC 37, 11 OCB 3 (BCB 1973) [Decision No. B-3-73 (Scope)]

BOARD OF COLLECTIVE BARGAINING
OFFICE OF COLLECTIVE BARGAINING

In the Matter of

DECISION NO. B-3-73

THE CITY OF NEW YORK,

DOCKET NO. BCB-143-72

Petitioner (I-95-72)

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent

DECISION DETERMINATION AND ORDER

On September 25, 1972 the respondent, District Council 37, AFSCME, AFL-CIO ("the union") requested that an impasse panel be appointed to resolve certain matters upon which the parties had been unable to reach agreement in the course of prior negotiations and mediation. The parties thereafter selected a mutually acceptable impasse panel from lists provided by the office of Collective Bargaining and Mr. Jonas Aarons was duly appointed to so serve on October 16, 1972. An impasse panel hearing was held on December 8, 1972. Among the union demands sought to be submitted to the impasse panel were five which the City claimed were not within the scope of mandatory bargaining and therefore not submissible to impasse procedures except upon the consent of both of the parties. On December 13, 1972, the City submitted a petition, commencing the instant proceeding, requesting that this Board determine the bargainability of the said five demands.

Written statements of position on this matter were submitted by the parties on January 12, 1973, at this point the Union withdrew one of the five demands in question, leaving four issues to be determined by the Board. The demands, the positions of the parties and our views on each are set forth seriatim, our determinations are not intended to pass upon the merits of the particular demands involved but only upon the bargainability of the subjects thereof.

I

DEMAND

"Indoor lifeguards be paid on an annual basis and receive all fringe benefits given to Career and Salary employees;"

CITY POSITION

The demand as it relates to bargaining for fringe benefits similar to those of Career and Salary Plan employees involves a mandatory subject of bargaining. But to the extent that it seeks "to alter the character of employment ... or put lifeguards in the Career and Salary Plan it is not a mandatory subject." The City's managerial prerogative entitles it "... to decide whether services shall be year round or seasonal."; to determine " ... the nature and function of the job offered ..."; to determine "the most efficient manner to operate the government." To the extent the demand ... "may relate to the

Civil Service Commission, the impasse panel would only have power to recommend ..."

UNION POSITION

The demand is related to the subject of pay practice and pay structures which the Board has held[1] to be within the scope of mandatory bargaining.

DISCUSSION

On its face, the demand does not appear to encompass the elements which the City cites and objects to as encroachments upon management prerogative and/or Civil Service Law. Since the City concedes that bargaining on fringe benefits, similar to those received by Career and Salary Plan employees, is mandatory, we need consider only the one other element of the demand, namely, that "indoor lifeguards be paid on an annual basis ..." To say that bargaining on that demand is mandatory is not to say that such lifeguards must be employed or that lifeguard service must be made available to the public 365 days a year. Reading

[1] In Matter of Association of Building Inspectors -and- Housing and Development Administration, Decision No. B-4-71 and in Matter of City of New York -and- Social Service Employees Union Decision No. B-11-68.

the demand as stated, the direction to bargain on it would mean only that the parties would negotiate as to whether lifeguards are to be paid on a per annum basis as opposed to a per hour, per diem, per week or per mouth basis. We therefore find that the Union's demand for bargaining for fringe benefits similar to those received by Career and Salary Plan employees and for payment of lifeguards on an annual basis relates to mandatory subjects of bargaining and may be submitted to the impasse panel.

II

DEMAND

"PRCAA shall provide the following equipment to those indoor facilities that can demonstrate a need for it:

a) Kick boards, lemon lines, starting blocks, starting guns and blank cartridges, backstroke flags;

b) Lifeguards stands (similar to those used at outdoor pools, not those at beaches);

PRCAA shall implement the recommendations made to it with regard to new equipment."

CITY POSITION

The level and quality of service to be provided, the means of providing it, including the equipment to be used are clearly matters of management prerogative and thus relate to a permissive subject of bargaining.

UNION POSITION

It is true that it is management's prerogative to determine the nature and quality of services to be rendered and the means to be employed; but once that decision has been made and the tasks assigned to personnel have been fixed, failure by management to provide equipment necessary for performance of those tasks has a "practical impact" on the affected employees and the matter thus becomes a mandatory subject of bargaining. Necessary equipment was held within the scope of bargaining in Decision No. B-11-68, supra.

DISCUSSION

Our Decision No. B-11-68 held, with regard to a group of demands, collectively referred to as "Services and Supplies," that demands for desk pens and stamps were bargainable but that demands regarding timeclocks and time sheets were opposed by the City as involving reserved management rights and as to those matters decision was reserved. The order in B-11-68 expressly reserved decision on all union proposals challenged by the City as relating to management prerogatives. Therefore, that decision did not establish the principle that "necessary equipment" constitutes a mandatory subject of bargaining. The Union's other argument, namely, that the failure to provide equipment essential

to the fulfillment of duties and tasks set by management in the otherwise proper exercise of its management prerogative constitutes a practical impact on affected' employees appears to be relevant if proved. The Union, at this point, however, has offered no proof as to the necessity of the equipment such as would warrant a finding that the lack of the equipment in question creates such a serious burden to affected employees as to constitute a practical impact.

It is our finding, as to this matter, that the Union's demand for the specified equipment does not constitute a mandatory subject of bargaining. This determination is made without prejudice to the Union's right to establish the existence of a practical impact.

III

DEMAND

"Once they have successfully completed their probationary period, all lifeguards personnel shall be granted the right to submit to impartial arbitration any discipline action taken against them."

CITY POSITION

The right to discipline is a management prerogative and subserves all other management prerogatives by providing the means of enforcing and effectuating them; as such it is a permissive subject of bargaining and management cannot be compelled to bargain on it or to submit it to fact finding even where there ~as been previous bargaining and/or agreement on the subject.

UNION POSITION

The right to submit grievances (including discipline) to arbitration is a working condition and a mandatory subject of bargaining. Lifeguards are non-competitive employees and therefore hive no statutory rights of hearing. "It is the policy of the City and of the NYCCBL to encourage binding arbitration of disputes." This does not interfere with management's prerogative to take disciplinary action "since it is only after such action is taken that a right to arbitrate the matter ensues.

DISCUSSION

The Board distinguishes the right of the City to take disciplinary action from the right of the Union to submit to arbitration any disciplinary action taken. The right to take disciplinary action against its employees is specifically reserved to management by §1173-4.3(b) of the New York City Collective Bargaining Law. There is ample evidence, however, that it was not the intent of the legislature to grant this right to management without providing any form of redress to employees affected by the exercise of the power. There existed, long before the enactment of the cited section of the Administrative Code, sections of the New York State Constitution, the New York State Civil Service Law and related New York City law guaranteeing to most government employees the right to certain procedural protections, including rights of appeal, against the exercise of their employer's right to take disciplinary action. In our view, the employer's right included in §1173-4.3(b) was intended by the Legislature to exist side by side and in harmony with the preexisting rights of such employees with regard to disciplinary matters. This coexistence of both sets of rights -- those of the employer and of its employees -- is a matter of fact not conjecture, management

having exercised its right to take disciplinary action and employees having demanded and received the protections of §75 of the Civil Service Law throughout the period since enactment of the New York City Collective Bargaining Law. What was actually affected by enactment of §1173-4.3(b) of NYCCBL is not management's right to take disciplinary action. Rather, while establishing collective bargaining rights, it reaffirmed management's preexisting right to take disciplinary action.

Since the management prerogative provision of NYCCBL was not intended to cover the entire area of discipline and eliminate the appeal rights possessed by most City employees under Civil Service Law §75, it cannot be said to bar appeal rights to any employee, including those not covered by §75 of the Civil Service Law such as the employees in the instant matter. When the NYCCBL was amended, in 1971, to incorporate the management prerogative language which had theretofore been a part of Executive Order No. 52, there was also enacted an amendment of the New York City Charter (§1103) which provides that collective bargaining agreements may include provisions for the submission of disciplinary actions to arbitration. Thus, the existing procedures

for the appeal of management's exercise of its disciplinary powers were not only left untouched when the guarantee of that management power was written into the law, but the authorization of alternative forms of appeal was also enacted.[2]

In our view, it is not the purpose of the applicable collective bargaining laws to diminish or to limit the fights of appeal of employees or to bar bargaining on the forms which those well settled rights may take or the methods, means and procedures which may be utilized by the parties in effectuating them. The Court of Appeals, in Board of Education of Huntington v. Associated Teachers of Huntington, Inc., 331 N.Y.S. 2d 17, (April 1972), clearly set forth the general proposition that the Taylor Law is intended to give broad support to the principle of collective bargaining in all of its aspects, including the arbitration of grievances and specifically those arising out of disciplinary matters. It is consistent with that decision to interpret §1173-4.3(b) as protecting management's right to take disciplinary action but as not diminishing existing rights of employees to appeal from disciplinary rulings. Since the management rights clause

[2] Enactment of this section of the New York City Charter closely followed the enactment of §76, subd. 4, of the New York State Civil Service Law to similar effect with regard to state employees.

does not constitute a bar to bargaining on any other aspect of disciplinary power and because disciplinary action manifestly affects working conditions, bargaining on the matter of appeals from disciplinary actions and for the submission to arbitration of disciplinary rulings is mandatory. We find that the management rights clause makes bargaining on the matter of initiation of disciplinary action a permissive subject but does not so affect the right of a union to bargain over procedures for review of disciplinary actions taken by the City, and that the subject of appeals from disciplinary action as demanded here relates to working conditions and is a mandatory subject of bargaining.

IV.

DEMAND

"Regarding hiring procedures for lifeguard personnel:

a) Relating to the section on "Assignment' of the existing contract (Article III, Section 2): It shall be the policy of PRCAA to grant priority with regard to reemployment and assignment, to the employee who has the most seniority; regardless whether the junior of the two is available for appointment at an earlier date or not, In the event that the junior of the two is,

in fact, available for appointment at an earlier date, said junior shall be eligible to remain at his assignment[3] up till, but not beyond, the time that the senior of the two is himself available for appointment to said assignment. In no event shall a junior be entitled to deny employment to his senior."

CITY POSITION

It is a management prerogative to determine the standards of selection for employment and this right would be abrogated by the Union's demand that seniority constitute the sole basis for selection of employees.

UNION POSITION

The demand constitutes only a minor change in an existing contract provision. The Board has determined (In Matter of City of N.Y. and D.C. 37, Decision No. B-4-69 and Matter of Association of Building Inspectors and Housing and Development Administration, Decision No. B-4-71) that seniority is a mandatory subject of bargaining unless it interferes with Civil Service Law or management rights and this demand doesn't have such effect.

[3] In this discussion and the decision that follows the Board interprets the term "assignment" as synonymous with the term "appointment".

DISCUSSION

The Union's contention that this demand constitutes no great change in an existing seniority clause is inaccurate. As written, the demand introduces the totally new and significant provision that a former employee with greater seniority may "bump" a junior employee who accepted rehiring when it was initially offered and when the senior was not yet available for rehiring.

The application of considerations of seniority in the processes of laying off and hiring government employees is dealt with by §§ 80, 80a and 81 of the New York State Civil Service Law and Rule 5.5 of the Rules and Regulations of the Department of Civil Service. These State Civil Service provisions do not apply to New York City. The New York City Civil Service Law contains no provisions regulating the application of seniority to this class of employees. Hence, the Union's demand cannot be said to conflict with Civil Service Law. Nor do we agree that the demand, on its face, would constitute seniority as the sole basis for selection of employees. We see no interference with management's right under §1173-4.3(b) of NYCCBL to fix standards, to administer qualifying-examinations, and otherwise determine the fitness of candidates for employment as

lifeguards. We, therefore, find that according to our reasoning in Decision No. B-4-69 and Decision No. B-4-71, supra, the seniority demand herein is not inconsistent with applicable Civil Service Law or with management rights and constitutes a mandatory subject of bargaining.

ORDER AND DETERMINATION

For the reasons set forth above and pursuant to the powers vested in the Board of Collective Bargaining, it is

DETERMINED. that the Union's demands for bargaining as to pay practices and fringe benefits (herein Item I), arbitration of disciplinary actions (herein Item III) and seniority (herein Item IV) constitute mandatory subjects of bargaining; and it is further

DETERMINED, that the-Union's demand for bargaining as to specified items of equipment for indoor facilities (herein Item II) constitutes a permissive subject of bargaining, without prejudice, however, to the Union's right to establish the existence of a practical impact; and it is further

ORDERED, that the said Union demands numbered I, III and IV may be submitted by the parties to the impasse panel herein.

DATED: New York, N.Y.
February 21 1973.

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHMERTZ
M e m b e r

WALTER L. EISENBERG
M e m b e r

EDWARD SILVER
M e m b e r

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