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

DISTRICT COUNCIL 37, AFSCME, AFL-CIO

DECISION NO. B-1-74

DOCKET NO. BCB-165-73

-and-

THE CITY OF NEW YORK and
RELATED PUBLIC EMPLOYERS
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DETERMINATION AND ORDER

The parties to this proceeding have heretofore reached impasse in their negotiations for a City-wide contract and an impasse panel has been designated at the request of the parties. In the course of their negotiations the City has taken the position that five of the Union's demands are not mandatory subjects of bargaining. The first of these demands relates to pension benefits and the City's position with regard to this demand is based,in part, upon the contention that it is not an appropriate subject for bargaining in the current negotiations. Upon the issues thus presented, DC 37, AFSCME, AFL-CIO (hereinafter DC 37 or the Union) filed a petition,

on November 28, 1973, to determine the bargainability of the disputed items, all of which it maintains are mandatory subjects of bargaining. The City's Answer was filed on December 12, 1973 and both parties have presented this Board with memoranda in support of their respective positions.

DEMAND #2: "ALL UNFULFILLED OBLIGATIONS OF THE PREVIOUS CONTRACT AND ALL MATTERS NOT IMPLEMENTED BY A THIRD PARTY SHALL BE CARRIED OVER INTO THE NEW CONTRACT EXCEPT AS MODIFIED THROUGH NEGOTIATIONS."

The City characterizes this demand as vague. Based upon all of the information contained in the pleadings and memoranda filed by both of the parties, the Board deems this demand to refer only to a dispute with respect to alternative pension benefits and will confine demand No. 2 to that subject.

We reject the contention raised by the City in connection with this and other of the Union's demands, that bargaining for an alternative to the pension benefit is prohibited by the 1973 legislation barring the revision of existing pension plans.

We find no basis in the 1973 pension legislation for a finding that it was the intent of the Legislature, not only to bar improvement of pension benefits but bargaining on any economic substitute for the pension benefit. This point is more fully discussed in our decision on the Bargainabilitv of Union Demand #170. We find pertinent the decision of the Court of Appeals in Board of Education v Assoc. Teachers of Huntington, 30 N.Y. 2d 122 (1972), which holds, in effect, that bargaining is permitted on that which is not specifically and explicitly prohibited.

In November 1970, the City of New York and District Council 37 entered into a City-wide contract for the period July 1, 1970 to June 30, 1973. In this matter, DC 37 acted in its dual capacity as bargaining representative under NYCCBL §1173-4.3a(2) for all (City employees subject to the Career and Salary Plan on matters which must be uniform for all such employees, and as bargaining representative under NYCCBL §1173-4.3a(5) for all members of the New York City Retirement System. The units are almost - but not completely-identical and since DC 37 bargains for both, the negotiations were conducted simultaneously and the agreements which followed were embodied in a single document. The agreement on pensions, covering the second above-mentioned unit, was, of necessity, contingent upon approval by the State Legislature.

The proposed legislation agreed upon by the parties was duly submitted to the 1971 term of the Legislature, was not acted upon, and a two-day strike occurred in June of 1971.

Action by the OCB brought about the termination of that strike. A strike-settlement agreement between DC 37 and the City provided as follows:

(1) The City-wide pension agreement shall be resubmitted to the 1972 session of the State Legislature. Public statements by legislative leaders indicate that the body will be prepared to reconsider the pension proposal in the 1972 session after a thorough review of pension programs throughout the State.

(2) In the event the pension legislation to implement the current City-wide agreement is not adopted or in the event it is diminished in the 1972 session, the parties shall meet in an attempt to resolve the matter.

(3) In the event that the parties do riot resolve the dispute the matter shall be submitted to the impartial members of the Board of Collective Bargaining who shall make alter native recommendations whose total costs shall not exceed the total cost of the original proposal contained in the City-wide agreement and which do not State Legislative approval.

(4) All job actions throughout the City shall be terminated immediately and full service in all affected agencies shall be restored.

Following a second rejection by the Legislature in its Spring 1972 term, and after several months of discussions between the parties, the matter was to the impartial members of this Board for a recommendation as to an alternative benefit to replace the pension benefit.

Such a recommendation was made in January 1973, by the panel. The pertinent part of the recommendations of the impartial members of the Board of Collective Bargaining reads:

"a. Effective June 1, 1,1973, the City shall provide funds at the rate of $165 per year on a pro-rata basis on behalf of each covered full-time, per annum employee to an appropriate fund of the certified union for the purposes of making available for each eligible employee, supplemental Welfare Fund and or security benefits such as severance

> pay, under a plan to be devised, agreed-upon and established jointly by representatives of the certified union and the City, pursuant to the terms of a supplemental agreement to be reached by the parties, subject to the approval of the Corporation Counsel."

The recommendation was accepted by the Union but not accepted by the City. Thereafter, and throughout the negotiations for a new "City-wide contract" for the period commencing July 1, 1973, the parties attempted to resolve the matter of an alternative pension benefit but were unable to do so.

We find that impasse has now been reached on this subject. In making this finding, we need not, at this time determine whether the recommendations of the impasse panel, if any, on the issue of an alternative benefit with respect to any period prior to July 1, 1973, are subject to the finality provisions of Local Law No. 2 of 1972.

DEMAND #44: "THE CITY SHALL NEGOTIATE WITH THE UNION AS TO THE PRACTICAL IMPACT OF CONTRACTING OUT WORK NORMALLY PERFORMED BY EMPLOYEES COVERED BY THE CONTRACT."

Although the right to subcontract would clearly be within the City's reserved management rights, as set out in §1173-4.3b of the NYCCBL, it is equally clear that the practical impact of a decision to subcontract on the terms and conditions of employment of the affected employees must be bargained over.

The rights and duties of parties to a collective bargaining agreement concerning questions of practical impact were fully discussed by this Board in Decision B-9-68. We stated therein, that:

> "The determination of whether or not a practical impact exists, if the parties do not agree, is a question of fact to be determined by this Board. The Board believes that consistency in the determination of disputes over the scope of bargaining is necessary and that such consistency of decision and the application of overall standards on a very important issue will be achieved if questions of the existence of practical impact are determined by the Board of Collective Bargaining.
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> "Moreover, we believe that this result is required by our statutory obligation under the New York City Collective Bargaining Law. The authority of impasse panels is limited to matters within the scope of bargaining, but where a practical impact is alleged by a union and disputed by the City, there can be no resolution of any bargainable issue arising out of the alleged impact until the question of whether

> "the practical impact exists has been determined. In other words, the determination of the existence of practical impact is a condition precedent to determining whether there are any bargainable issues arising from the practical impact. Hence, the question of practical impact is a proper subject for final determination by this Board under Section 1173-5(a), City of New York and Uniformed Firefighters Assn., Local 94, IAFE, AFL-CIO and Uniformed Fire Officers Assn., Local 854, IAFL, AFL-CIO, B-9-68, at pp. 4 and 5.

The Board went on to state the following about the rights reserved to management under the NYCCBL:

> "Once this Board determines an that an 'impact' exists, the City will required expeditiously to take whatever action is necessary to relieve the impact Relieving the impact can be done by the City on its own initiative if it chooses to act through the exercise of rights reserved to it in Section 5c. [Section 1173-7-4 Local Law No. 53] If it cannot relieve the impact in that manner, or it chooses to take action by offering changes in wages, hours and working conditions - means which are not reserved to the City specifically under Section 5c- then, of course, the City cannot act unilaterally but must bargain out these matters with the Union. In that case, failure to agree will permit the Union to use the procedures of the law to the full including the use of an impasse panel." Id. at pp. 7 and 8.

Board Decision B-9-68, as it interprets the management rights language of the NYCCBL, is consistent with the decisions of the State Public Employment Relations Board."

PERB, in its decisions on subcontracting, the Fibreboard rationale of the nlrb (Infra pp. 12-13) In Union Free School District No. 14, Town of Hempstcad & Hewlett - Woodmere Faculty Assn., 6 PERB 4520, decided February 6, 1973, respondent had retained its sole speech teacher but retained the Woodmere Center for Speech Disorders to render services in speech therapy. Respondent, citing Fibreboard, contended that its decision to change the method of providing therapy to its students and the implementation of that decision did not constitute "contracting out" of unit work inasmuch as there was no replacement of unit employees, the work performed was not the same and the conditions of employment were not similar. The hearing officer found that:

> "[T] his is not a 'contracting out' case since the respondent's conduct had no effect upon the terms and conditions of employment of unit employees and did not result in the replacement of any such employees. Rather, the respondent's conduct was merely an exercise of its managerial prerogative to determine the method to be used to fulfill its mission." 6 PERB 4520, 4521.

Where a unilateral decision by management to cut its budget resulted in the elimination of about 20% of its professional work force, PERB found:

> "[I]t does not follow that every decision of a public employer which may affect job security is a manadatory subject of negotiations. We conclude, for tile reasons set forth below, that the decision to curtail services and eliminate jobs is not a mandatory subject of negotiations, although the employer is obligated to negotiate on the impact of such decision on the terms and conditions of employment of the employees affected " City School District of the City of New Rochelle and New Rochelle Federation of Teachers, Local 280, AFT, AFL-CIO, 4 PERB 3704, 3706.

> "A public employer exists to provide certain services to its constituents, be it police protection, sanitation or, as in the case of the employer herein, education. Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employers . . . . This is not to say, however, that an employee organization is precluded from seeking negotiations concerning such decisions on a permissive basis." Id. at pp. 3706-3707.

In the private sector, the NLRB held that any employer who unilaterally contracts part of his operation for economic reasons, does not violate Section 8(a)(5) of the MRA by failure to notify and negotiate with the employee representative concerning his decision. The employer's action was deemed a management prerogative where all bargaining unit employees were replaced by an independent contractor. (Fibreboard Paper Products Corp., 130 NLRB 1558, 47 LRRM 1547)

The NLRB reconsidered its Fibreboard decision in Town and Country Mfg. Co.,136 NLRB 1022, 49 LRRM 1918, enforcement granted, 316 F.2d 346, 53 LRRM 2054 (C.A. 5th Cir. 1963), stating that its prior opinion

> "unduly extends tile area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them or negotiation with their bargaining representative."
> Id. at 1920.

But in NLRB v. Adams Dairy, Inc., 322F2d, 353 54 LRRM 2171 (C.A. 8th Cir. 1963) the Court of Appeals found that an employer's economically-motivated decision to have the distributions phase of his business conducted by independent contractors rather than employees was not a mandatory subject of bargaining.

Because of the conflict in the courts of appeals, the Supreme Court granted certiorari in Fibreboard, 379 U.S. 203, 57 LRRM 2611 and agreed with the 5th Circuit that "on the facts of [that] case," the subcontracting of work previously performed by bargaining unit members is a mandatory subject of bargaining. But the narrowness of the holding is clarified on reading this language in the opinion:

> "We are [ ]not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case - the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment is a statutory subject of collective bargaining under §8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'sub-contracting' which arise daily in our complex economy." Id. at 2613 and 2614.

Union Demand #44 would prevent the City's taking-the initiative to relieve any impact in the most expeditious manner and, as the City suggests (City Memo, p. 10), "would oust the Board of its duty and obligation to interpret and enforce the NYCCBL and give an arbitrator the authority to determine the meaning of the term practical impact, whether an impact occurred, and the ensuing obligations of the parties."

Consultation between the employer and employee representative prior to the exercise of a management prerogative is, of course, permissible. We believe that such cooperative action, on a voluntary basis, is, in most bases, a firm support of the collective bargaining relationship between the parties and should be fostered. We adhere, however, to the rationale set forth in Decision B-9-68, supra, and accordingly find that union Demand #44 is not a mandatory subject of bargaining and may not be submitted to the impasse panel.

DEMAND #145: FOR AN EMPLOYEE WHO IS UNDER 55 YEARS OF AGE, THE CITY SHALL PAY A GROUP LIFE INSURANCE BENEFIT IN AN AMOUNT EQUAL TO THE FOLLOWING:

A) For service from 0 to 6 months, one half year's salary

B) For service from 6 months to 10 years, one year's salary

C) From 10 years to 20 years, 2 years' salary

D) over 20 years, 3 years' salary.

The City argues that a life insurance benefit is an integral part of the pension systems and as such is prohibited from negotiation by the State legislation of May 31, 1973.

It is clear that a life insurance benefit may be established separate and apart from pensions. Life insurance is customarily a mandatory subject of bargaining.

L. 1973, c. 382, s. 48 prohibits changes negotiated "with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees or their beneficiaries." The benefit sought by DC 37 does not require an insurer to pay income" to "retirees" or to make direct "payment to retirees or their beneficiaries." Union demand #145 seeks a life insurance benefit for employees and not retirees. Such a demand we find to be mandatorily bargainable and factfindable.

DEMAND #170: IF THE I.T.H.P. IS NOT RENEWED, THE CITY SHALL PAY A WAGE INCREASE EQUAL TO THE TOTAL AM0UNT LOST BECAUSE OF SUCH FAILURE TO RENEW.

Increased-Take-Home-Pay in effect, compensates employees with the dollar equivalent of what they must pay annually into the retirement fund. It is a City funded offset to the contributions required of Members of the Retirement System. Benefits attributable to ITHP are payable only upon death or Retirement and contributions under ITHP are not refundable, as are employee contributions, upon termination other than by death or Retirement. DC 37's demand would require the City to compensate employees with an amount of money equal to what it would cost employees in the event ITHP were not approved by the legislature for any year of the collective bargaining agreement.

The City asserts that the demand seeks to substitute a benefit for pensions in circumvention of the prohibitive legislation. By this reasoning, any benefit proposed by the Union (i.e. increased vacation or holiday pay) which is designed to channel monies from the pension area into other benefit areas would be prohibited by the new law. However, that legislation was not designed to prevent the City's expenditure of collective bargaining dollars. Thus, if the City had budgeted $10 million for collective bargaining purposes including pensions, the Union could still make $10 million in demands excluding pensions without violating the law.

The City argues alternatively that Union demand No. 170 is a wage demand and therefore bargainable not at the city-wide level but the unit level. We find that the demand is in the nature of a wage demand but that ITHP is so inextricably related to pension bargaining, having been covered in the pension provisions of the prior city-wide contract, that it is properly bargainable at the city-wide level. Bargaining under this demand would seek a benefit in lieu of ITHP and would be uniform for all employees covered by the city-wide contract. Our holding on this question is consistent with our finding in Matter of New York City Society of Urban Coordinators, decision No. B-15-72 in which we said:

> "We therefore decide that a money demand directly tied to pension benefits, or as an alternative benefit to pensions, is not bargainable by a representative having less than City-wide status for all Career and Salary employees."

Accordingly, we find that Union demand No. 170 relates to a mandatory subject of bargaining at the City-wide level and may be submitted to the impasse panel.

DEMAND #172: ARTICLE XII OF THE 1970-73 CITY-WIDE CONTRACT SHALL BE C0NTINUED EXCEPT THAT SECTION 1 SHALL BE MODIFIED TO READ AS FOLLOWS:

> INSOFAR AS LEGALLY PERMISSIBLE, THE CITY AND THE UNION AGREE TO SPONSOR MUTUALLY AGREED UPON LEGISLATION TO PROVIDE CERTAIN IMPROVEMENTS IN PENSIOU BENEFITS AS LISTED IN THIS ARTICLE.

Section 48, Chapter 382 of the Laws of 1973, prohibits the implementation of agreements for the revision of existing pension provisions. Section 1173-7.0c(3)(c) prohibits a direction by an impasse panel that the City support a recommendation which must be addressed to a third party "body, agency or official." The Union seeks in the present impasse procedure herein to establish alternative benefits to replace the benefits which it would be entitled to seek in the form of pension revisions if such revisions were not prohibited by Chapter 382 of the Laws of 1973. For all of these reasons we find that bargaining on Union Demand No. 172 is not appropriate for the prospective term of the City-wide contract now being negotiated. Accordingly, we find that the demand may not be submitted to the impasse panel.

With respect to those demands which we have found to be mandatorily bargainable and, therefore, referrable to the impasse panel, our decision is confined to the question of bargainability of the demands and in no way constitutes a decision on the merits thereof. Judgment as to the merits, if any, of such demands rests solely and exclusively with the designated impasse panel.

O R D E R

For the reasons set forth above and pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law to make final determinations as to scope of bargaining, it is hereby

ORDERED, that Union demand No. 2 as interpreted by the Board, for an alternative pension benefit is within the mandatory scope of collective bargaining and may be considered by the impasse panel. Such issue is subject to the finality provisions of Section 1173-7.0 c (4) for the period effective on or after July 1, 1973. However, decision is reserved by the Board as to whether recommendations of the impasse panel, if any, on this issue if made effective prior to July 1, 1973, are subject to the aforesaid finality provisions.

ORDERED, that Union demand No. 44 is not within the mandatory scope of collective bargaining and may not be considered by the impasse panel except upon the consent of the parties; and it is further

ORDERED, that Union demand Nos. 145 and 170 are within the mandatory scope of collective bargaining and may be considered by the impasse panel; and it is further

ORDERED, that Union demand No. 172 is not an appropriate subject for bargaining in these negotiations.

DATED: New York, N.Y.
January 11, 1974

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

EDWARD SILVER
MEMBER

JOHN H. MORTIMER
MEMBER

HARRY FRUMERMAN
MEMBER