City v. DC 37, 13 OCB 4 (BCB 1974) [Decision No. B-4-74 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
B0ARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK, DECISION NO. B-4-74

Petitioner, DOCKET NO. BCB-168-74

- and -

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

The New York City Board of Higher Education (hereinafter the City) and District Council 37 (hereinafter DC 37 or the Union), having impassed in their negotiations for a first contract covering Urban Center clerical titles, on September 24, 1973, filed with this Board a request for appointment of an impasse panel. A one-man panel was appointed as of October 31, 1973. On January 24, 1974, the City's Office of Labor Relations (hereinafter OLR) filed a petition with this Board requesting a determination as to the bargainability and fact-findability of Union Demand #4. That demand reads as follows:

> "All positions above the entry level, shall be filled from amongst employees in lower titles."

By Board of Certification Decision No. 46-73, DC 37 is the certified bargaining representative for a unit which includes twenty-one clerical titles in the Urban Centers and five College Office Assistant titles, all within the Board of Higher Education. The former titles are non-Civil Service and are the titles involved in the present impasse. The latter

titles (so-called Gittelson positions) are covered by a contract executed on January 6, 1974, for the period July 1, 1972, to June 30, 1974.

Positions of the Parties

Petitioner City of New York OLR, representing the Board of Higher Education, alleges that Union Demand #4 "is designed to prevent the employer from filling certain vacancies with employees from outside the bargaining unit" and "concerns the qualifications which must he met in order to be hired in particular positions." As such, the demand falls within the management rights of the City under §1173-4.31) of the NYCCBL, is not a mandatory subject of bargaining, and may not be presented to an impasse panel without the consent of the City.

The Union in its answer alleges that the Board of Higher Education positions corresponding to Urban Center positions above the entry level "must be filled from amongst employees in lower titles" and that these "promotional rights and benefits" must be granted to Ubran Center employees. DC 37 relies on a 1969 agreement "between the Board of Higher Education of the City of New York acting as a Board of Tru~tees for the Borough of Manhattan Community College at New York City . . . and the State University of New York" containing a clause which states:

> "10. It is agreed by the parties that the staff members operating the urban center are to be employees of the College and that their responsibilities, terms of employment, remuneration and rights and benefits shall be in accordance with the provisions of law, rules and regulations applicable to corresponding personnel in the College and with its prevailing practices."

Thus, DC 37 argues that the management rights of §1173-4.3b do not apply "since the Board has waived any such rights by entering into the aforesaid contract."[1]

The City's reply maintains that a public employer can only waive its right to refuse to bargain over a permissive subject by agreeing to bargain over that subject with the certified or designated public employee organization. It argues further that DC 37 lacks standing to raise a question of interpretation of an agreement between the Board of Higher Education and its funding agency before OCB in a case seeking merely to define whether a particular subject is a mandatory subject of bargaining within the meaning of the NYCCBL.

D E C I S I 0 N

This case presents two issues for the Board. First, is the bargaining demand in question a mandatory or permissive subject of bargaining? Second, if a permissive subject, has the City waived its right to refuse bargaining

The Union demand, if accepted, would place restrictions on the City in its selection-of employees to fill positions above the entry level. The City would be required to promote employees from among bargaining unit clerical

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[1] It is to be noted that the contract relied on by the Union in this matter involves only Manhattan Community College, yet Urban Centers are not confined to that college.

titles and prohibited from filling vacancies by hiring, outside applicants irrespective of their qualifications. Section 1173-4.3b of the NYCCBL provides

> "It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining."

This language clearly gives management the right to maintain the greatest flexibility in selecting persons to fill vacancies.

In Decision No. 13-7-72, this Board found the subject of a ban on lateral transfers not a mandatory subject, but a voluntary or permissive subject of collective bargaining:

> ". . . 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. '"

And, city agreement not to seek lateral transfers into unit titles would be "no more than a waiver by the City of its managerial discretion to request such transfers." Accordingly, the Board determined, as it had earlier in BCB-11-68, that the subject could be negotiated only on mutual consent and submitted to an impasse panel only on mutual consent.

In B-16-71, the Union (DC 37) had made a demand that the City promote employees via City-wide promotion lists rather than department promotion lists. The Board held that in the absence of a prohibition forbidding the Civil Service Commission from holding City-wide promotion exams and establishing City-wide lists, the Board could determine the scope of bargaining.[2]

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[2] The employees in the instant case hold non-Civil Service titles and, therefore, we need not be concerned with the manner in which Civil Service law and rules might affect the Union's demand.

The Board then found the Union's demand

> ". . . in conflict with the rights reserved to management . . . to 'determine the standards of selection for employment' and to 'determine the methods, means and personnel by which government operations are to be conducted."'

The right to hire qualified outside applicants for vacant positions above the entry level is as much within the City's management prerogatives as the right to fill positions by lateral transfer or by using departmental promotion lists.[3]

Thus, the issue is whether or not the City waived its right to refuse bargaining over a permissive subject. Interpreting the language relied on by DC 37, we find no waiver of rights by the City in favor of DC 37 in an agreement to which neither DC 37 nor any other labor organization is a party. The three categories of subjects for bargaining (prohibited, mandatory, and permissive) have meaning only in a collective bargaining relationship. Any waiver of rights by the Board of Higher Education in its agreement with the State University does not, as a matter of law, automatically inure to the benefit of DC 37.

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[3] However, once the City should decide to promote from within the bargaining unit, the practical impact of that decision, if any, may, of course, give rise to a proper demand for bargaining. See §1173-4.3b of the NYCCBL supra, and B-11-68. And, in B-2-73 the Board found that a union may bargain for standards as to promotions within the unit.

This is especially so where the agreement between the Board of Higher Education and the State University was executed on July 10, 1969, and DC 37 had not petitioned for certification as exclusive bargaining representative of Urban Center employees until March 21, 1972 (RU-187-B-70, Decision No. 14-73). As the City suggests in its reply, DC 37 would have no control over changes in an agreement to which it was not a party, Labor relations stability requires that employees' rights and benefits be embodied in a written collective bargaining agreement. The policy of the NYCCBL recognizes this requirement,[4] Certainly, DC 37 would not, as a matter of law, automatically be bound by a reduction in benefits should the City negotiate such a reduction by agreement with a third party,

Even if DC 37 were relying upon language contained in a collective bargaining agreement covering a different unit, it could not assert that the City had waived its right to refuse bargaining on a voluntary subject in the instant case, absent a showing of discriminatory treatment of employees. As the Board stated in Decision No. B-7-72:

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[4] Section 1173-2.0. Statement of policy. It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

> "it, . . (W)hether 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, " [5]

Further, if DC 37 were relying upon a collective bargaining agreement rather than a contract between the Board of Higher Education and the State University, it must be recalled that said contract dates back to July 10, 1969, and would not bind the City to bargaining over subjects contained therein in 1973-1974 negotiations. As we pointed out in our Decision No. B-11-68:

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[5]As mentioned ' supra, Urban Center employees are only a part of the unit represented by DC 37 under Decision No. 46-73. The collective bargaining agreement covering the Gittelson Civil Service titles provides that employees in those titles may grieve "a claimed improper holding of an open-competitive rather than a promotional examination." DC 37 does not direct the Board's attention to this agreement or in any other way allege that Urban Center employees are being discriminated against by the City's refusal to bargain over the voluntary subject at issue herein

> "Generally, full and free discussion and airing of problems are the keystones of good labor relations. If agreement is reached on a voluntary subject, the agreement may be embodied in the collective bargaining contract. The obligation then is contractual, and may be enforced as such during the term of the contract. But the fact that such agreement has been reached and included in a contract cannot transform a voluntary subject into a mandatory subject in subsequent negotiations, for the latter is fixed and determined by law, Moreover, any doctrine that agreement reached on a voluntary subject forever obligates bargaining thereon would, as a practical matter, constitute a formidable deterrent to the highly desirable freedom of discussion and negotiation on voluntary subjects."

For all of these reasons, we find that the demand in question is a voluntary subject of bargaining within the City's management prerogatives and, further, we find that the City has not waived its right to refuse bargaining over said voluntary subject.

O R D E R

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 #4 is not within the mandatory scope of collective bargaining herein and may not be submitted to the impasse panel except upon the consent of the parties.

DATED: New York, New York
March 18, 1974

ARVID ANDERSON
Chairman

ERIC J. SCHMERTZ
Member

VINCENT D. McDONNELL
Member

EDWARD SILVER
Member

Board Member Walter L. Eisenberg did not participate in deciding this case.