City & CUNY v. DC 37, 15 OCB 17 (BCB 1975) [Decision No. B-17-75 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

CITY OF NEW YORK and THE CITY UNIVERSITY OF NEW YORK,
Petitioners,
-and

DECISION No. B-17-75

DOCKET NO. BCB-214-75

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.

D E C I S I 0 N

On January 21, 1974, District Council 37, AFSCME, AFL-CIO, was designated as he representative for collective bargaining purposes of all employees of the City University of New York (CUNY) subject to the jurisdiction of the Office of Collective Bargaining, on matters which must be uniform for all such employees.[1] Shortly thereafter, the parties entered into negotiations. After approximately ten meetings, the negotiations between the parties reached and impasse and on December 13, 1974, the Union filed its request for the appointment of an impasse panel.

[1] Board of Certification Decision No. 6-74.

The City, in its Petition received by this office on March 6, 1975, contended that all ten of the Union's demands care non-negotiable because they concern subjects which must be uniform for all employees of the City University and the Union does not represent more than fifty per cent of all such employees. In addition, the City alleged specific objections to the bargainability of Union demands 2,3,9, and 10.

The Union, in its Answer filed on April 14, 1975, conceded that demand No. 10 dealt with a subject covered by the City-Wide Contract and therefore the demand was withdrawn.[2] The Answer, however, supported the bargainability at the departmental level of all the other contested demands.

The City, in Reply received by this office on April 29, 1975, questioned the validity of Board of Certification Decision No. 6-74, stating that a determination of the scope of bargaining issues now before the Board

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[2] Demand No. 10 read as follows:

> "The Board shall provide safe and personally secure working facilities for all employees covered by this agreement."

Concerning the withdrawal of the demand the Union stated: [Union Answer, p.6]

> "The City is apparently correct on this one. The subject is covered by Art. IX, Sec. 8 of the City-wide contract. Non-instructional employees of the Board of Higher Education (CUNY) are covered by that provision, pursuant Art. I, Sec. Id, and Paragraph 4 of the Mayor's approval of the election of the Board of Higher Education to come under the New York City Collective Bargaining Law. Therefore, this demand is withdrawn."

"cannot be made except after a thorough review and reconsideration of the result reached by the Board of Certification" in that case.

Appropriate Unit for Bargaining

The City contends that Union demands 1 through 10 "are matters which must he uniform for all employees in a particular department" and may he negotiated only by the designated representative of bargaining units "which include more than fifty per cent of all employees in the department." The City alleges that the Union herein "does not represent more than fifty per cent of all employees in the department... within the meaning of Section 1173-4.3 a(3) of the New York City Collective Bargaining Law (NYCCBL) and, therefore, may not negotiate on behalf of all employees in the Board of Higher Education."[3]

[3] NYCCBL - Section 1173-43
"a. Subject to the Provisions of subdivision b of this section and subdivision c of section 1173-4.0 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions, except that"

(3) matters which must be uniform for all employees in a particular department shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all employees in the department."

The Union, in response, asserts:

> "The City's argument that the Union's demands all involve issues which must be uniform for non-instructional and instructional employees alike is essentially the same argument made by the city when it opposed the original designation of the Union for this unit of employees. "This argument was rejected by the Board (of Certification)." [Union Answer, p.2]

The election of the Board of Higher Education to come under the jurisdiction of the OCB and the Mayor's approval thereof provide for coverage, of only "employees of the university who are not members of the Instructional Staff." Board of Certification Decision No. 6-74 establishes that District Council 37 is the certified representative of bargaining units which includes a majority of the employees of the City University who are subject to the jurisdiction of the OCB.

As the Union points out in its Answer, so long as its demands are within the scope of bargaining and concern subjects that need to he uniform for all non-instructional employees of the City University, the fact that some of the demands ma-yr affect the instructional employees as well, does not mean that they arc inappropriate for bargaining on a departmental level by this Union.

The City, in its Reply, asks for a review of Board of Certification Decision No. 6-74, claiming that the Union herein was improperly designate as the departmental representative for these employees. The City argues that "the Board of

Collective Bargaining (BCB) is independently empowered to investigate and render a determination respecting the proper interpretation of NYCCBL Section 1173-4.3 (a) (3) by reason of NYCCBL Section 1173-5.0 (a) (1)."[4]

If the City or a union wishes to challenge a past decision of the Board of Certification concerning the propriety of the certification or designation of a public employee organization as the exclusive bargaining representative of a particular collective bargaining unit, it should adhere to the procedures laid out in the law and rules of the NYCCBL. A scope of bargaining case before this Board is not the proper forum from which to attack collaterally a Board of Certification representational decision.

Individually Contested Demands

Demand No. 2

Demand No. 2 provides:

> "Employees required to work during an unscheduled school closing, such as a snow or heat emergency, or during a registration period, shall receive compensatory time off. All employees who are scheduled to work but who are sent home when there is an unscheduled closing shall be paid for the time they would have worked."

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[4] NYCCBL Section 1173-5.0
"a. Board of collective bargaining. The hoard of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may he conferred upon it from time to time by law, shall have the power and duty:

(1) on the request of a public employer or public employee organization which is a party to a disagreement concerning the interpretation or application of the provisions of this chapter, to consider such disagreement and report its conclusion to the parties and the public;"

The City contests the bargainability of this demand alleging that "the subject is a wage demand reserve(I for title-wide bargaining" and the Union "is not a unit representative of employees within the meaning of Section 1173-4.3."

The Union counters that the only employees affected by unscheduled school closings and registration periods are employees of the City University and therefore the demand is manifestly appropriate for departmental bargaining. The Union argues that the demand is not a matter that need be uniform City-wide nor is it appropriate for "occupation-wide bargaining which would result in a piecemeal approach which would, be impossible to administer and obviously would be intolerable to CUNY."

In Board Decision No. 3-11-68 a demand concerning "Release for heat or cold" was found to he a subject relating to overtime and time and leave rules, and thus a matter which must be uniform City-wide, there being no unique or special considerations established to qualify it for departmental bargaining.[5]

[5] NYCCBL Section 1173-4.3 (a) (2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and. time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organization designated by the Board of Certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement execute pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved;"

Insofar as this demand concerns employees who are required to work during an unscheduled school closing or who are sent home when there is an unscheduled school closing, the Union fails to prove why these situations are inappropriate for Citywide bargaining in line with Decision No. B-11-68. No-attempt has been made by the Union to differentiate such school closings from unscheduled closings of other City agencies or offices.

In addition, assuming that work performed during registration periods by these employees constitutes overtime work, the Union fails to distinguish how such work differs from overtime work performed by other City employees. There being no special or unique considerations established peculiar to non-instructional employees of CUNY with regard to work done during registration periods or unscheduled school closings, we find this demand inappropriate for departmental bargaining. However, this finding is without prejudice to a later filing of a petition by the Union alleging special and unique considerations, as contemplated by NYCCLB Section 1173-4.3(a)(2), which reads in pertinent part as follows:

> . . . nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to Bargain for a variation or a particular application of any city wide policy or any term or any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective Bargaining unit are involved."

Demand No. 3

Demand No. 3 provides:

> "In each college or unit which provides parking facilities for employees covered by this contract, there shall he established a joint Union management committee consisting of four union representative to (1) review and discuss the rules and regulations relating to parking in that college or unit and to negotiate changes in said rules, and (2) to review and discuss the fees charged for parking, if any, and to negotiate changes in said fees."

The City contends that this demand is not bargainable because the subject of parking, citing Board Decision, No. B-11-68, "is negotiable only when employees' services require the use of an automobile." In cases like this one, where the employees' services do not require the use of an automobile "decisions to provide parking facilities, to make rules and regulations relating to those facilities and to charge fees are managerial prerogatives..."[6]

[6] NYCCBL Section 1173-4.3
"b. It is the right of the city, or any other public employer 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."

In addition, the City argues that this is not a subject which "must be uniform for all employees in the department and is not, therefore, within the s-cope of collective bargaining as between these parties."

The Union answers that the issue of parking fees was the catalyst that led to the original petition for a departmental designation. The Administration of Queens College unilaterally raised the parking fees for all employees and both the individual college and CUNY refused to Bargain on the issue.

The Union, relying on State of New York and The Civil Service Employees Association, Inc. (CSEA), 6 PERB 3020, contends that parking fees and the increasing of such fees are terns and conditions of employment. The Union emphasizes that this demand concerns fees charged for the use of existing facilities, available to all employees regardless of whether automobiles are necessary for the performance of their employment duties.

The Union concludes that such a matter must be uniform for all employees in the department since "it is inconceivable that CUNY would want to charge different fees to its non-instructional employees, depending on title."

Board Decision No. B-11-68 dealt in part with a request by the Social Service Employees Union for free parking facilities. We found that such a request directly concerns those employees whose services require the use of an automobile and therefore was negotiable by the appropriate title representative.

However, this demand, as noted above, concerns fees charged for the use of existing facilities previously made available to all employees. The New York State Public Employment Relations Board (PERB), in State of New York and CSEA,(supra), upheld the ruling of a hearing officer that free parking is a term and condition of employment and therefore the unilateral imposition by the State of a parking fee at locations where free parking spaces had previously been provided constituted a violation of the State's statutory obligation to bargain in good faith. The hearing officer took administrative notice of the fact that free parking facilities are an inducement to employment that free parking facilities
and therefore a term and condition of employment (5 PERB 4590) He also found that "any connection between the State's public transportation and urban development policies and its employee parking foes is too tenuous and remote to place the matter in the management prerogative category."

In its Reply, the City warns that if this demand is to go to an impasse panel -for determination, it is possible that the final recommendation made by the panel could ultimately be inconsistent with the recommendation of an impasse panel in another case, concerning a similar demand by the instructional employees of CUNY. The City has come full-circle in its objections to this demand. In its petition, it claims that this subject is not a matter which need he uniform for all employees in the department. The City now claims that the demand is not appropriate for bargaining by this Union because of possible

future inconsistent panel awards attributable to the fact that the Union does not represent all of the employees in the department. Looking at this internal inconsistency in the City's papers, the Board can only assume that the City has abandoned its argument that, the subject is not a matter requiring departmental uniformity.

To begin with, the City's argument concerning the possibility of future inconsistent panel recommendations goes to the merits of the demand rather than to its bargainability. moreover, if an impasse panel in this case should recommend the adoption of the Union's demand, the effect would be no more than the establishment of a joint-union-management committee to discuss and negotiate rules, regulations, and fees concerning presently existing parking facilities.

The Board is well aware of the serious problems that result fro-m inconsistent impasse panel awards and agrees that precautions should be taken where necessary to avoid such contingencies in the future. However, we do not view it as a problem in this case.

In the absence of any attempt to connect the subject matter of this demand to the rights reserved to the City by NYCCBL §1173-4.3 (b) (see footnote 6), and in light of PERB's ruling in The State of New York and CSEA, (supra), we find the demand appropriate for bargaining by this Union on a departmental basis.

Demand No. 9

Demand No. 9 provides:

> "Employees may take undergraduate and graduate courses tuition free"

The City, citing Board Decision No. B-2-73, claims this subject is only negotiable when the employer requires continued or advanced education asa qualification for continued employment or for improvement in pay or work assignments, which is not the case with these employees. It further claims that the demand is an infringement upon managerial prerogatives.

The Union replies that the City confuses the nature of the City confuses the nature of the demand in that the latter does not relate to training or continuing education to gain a differential, such as in the nurses case (B-2-73), but rather to a fringe benefit enjoyed by employees of many universities. The fact that these employees work for the City University system, argues the Union, makes the subject of tuition-free courses, a term and condition of employment. The Union analogizes such a benefit to Transit Authority employees getting free subway passes or to department store employees getting discounts.

In Board Decision No. B-2-73, a demand by the New York State Nurses Association for tuition reimbursement was found to be bargainable due to the employer's conceded practice of granting nurses a pay differential based upon the completion of studies above the minimum requirement level. The Board stated that:

[B-2-73, p.13]

> "...the matter of continuing education has unique significance for nurses relating to the nature of their profession, analogous to that which prevails in the teaching profession, which distinguishes them from other groups of employee; for whom continuing education may be a more optional matter."

The Union does not contend that the employees it represent's are similar to either teachers or nurses, thereby qualifying thorn for tuition reimbursements (free tuition) under the rationale of Decision No. B-2-73. Rather the fact that they work in a "college setting," the Union argues, makes this subject a term and condition of their employment.

Tt is true, as the Un-Jon states, that many universities allow their employees to take a certain number of courses tuition-free or at reduced rates. Universities have traditionally paid their employees lower salaries than those paid to comparable employees elsewhere. It may be for this reason, At least in part, that additional fringe bene fits,
such as tuition free courses, have traditional been offered as inducements for university employment in the private sector.

Non-instructional employees of CUNY, however, receive the same wages and fringe benefits as other City employees in respective titles. A supervising clerk who works for the Board of Higher Education is covered by the- same contract as a supervising clerk who works for any other City agency.

There thus appears to be no justification for granting to CUNY employees, as opposed to other City employees in identical titles, the unique right to bargain for tuition-free education.

The Union's argument that employment in a college setting automatically causes certain benefits, i.e., tuition-free courses, to become terms and conditions of employment is without merit. We find that the sole fact that these employees happen to work in a college setting -does not warrant a finding that this subject is appropriate for bargaining on a departmental basis.

This decision does not dispose of the bargainability of the subject at the City-wide or unit level nor is it in derogation of any existing contract rights.

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 is the properly designated departmental representative for the employees herein; and it is further

DETERMINED, that Demand No. 3 - Parking Fees, is within the mandatory scope of collective bargaining and appropriate for bargaining on the departmental level; and it is further

DETERMINED, that the following demands do not concern subjects appropriate for bargaining on the departmental level:

Demand No. 2 -

Work performed during unscheduled school closings and registration periods

Demand No. 9 - Tuition-free courses, and it is

ORDERED, that Union demands numbered 1, 3, 4, 5, 6, 7, and 8 may be submitted by the parties to an impasse panel.

DATED: New York, Now York.
June 4, 1975

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
M E M B E R

EDWARD F. GRAY
M E M B E R

JOSEPH J. SOLAR
M E M B E R

VINCENT McDONNELL
M E M B E R

THOMAS J. HERLIHY
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NOTE: Member Thomas J. Herlihy dissents on Demand #3; concurs on the others.