DC 37 v. City, 15 OCB 18 (BCB 1975) [Decision No. B-18-75 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

DISTRICT COUNCIL 37, AFSCME,
Petitioner

-and

CITY OF NEW YORK,
Respondent

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DECISION NO. B-18-75

DOCKET NO. BCB-212-75

DECISION AND ORDER

On January 14, 1975, District Council 37, filed a petition requesting the Board to determine that layoff procedures with respect to non-competitive employees is a mandatory subject of bargaining.[1]

DC 37 is the certified bargaining representative of employees holding the titles of Assistant Real Estate Repairman and Senior Addiction Specialist (Methadone). An unexpired collective agreement currently exists covering Senior Addiction Specialists. The contract covering Assistant Real Estate Repairman expired on December 31, 1974.[2] On

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[1] The Union also sought an expedited order staying and enjoining the City from terminating the employment of the affected employees pending determination and negotiation of the issue.

[2] The pleadings of both the Union and City indicated that unexpired contracts currently exist for both titles. Our own research indicates, however, that the contract covering Senior Specialist (Methadone) is effective January 1, 1974 - December 31, 1975, and that the parties are currently negotiating a successor contract covering Assistant Real Estate Repairman.

January 9, 1975, the City notified various employees holding these titles that their employment would be terminated as of January 17, 1975. The titles of Assistant Real Estate Repairman and Senior Addiction Specialist (Methadone) fall within the non-competitive class of the classified civil service and, as such, are not subject to the requirements applicable to competitive employees under New York State Civil Service Law or the Rules and Regulations of the New York City Civil Service Commission with respect to a reduction or abolition of positions in civil service.

CONTENTIONS OF THE PARTIES

The Union alleges in its petition that the terminations were arbitrary and that the termination notices were issued without prior notice to and negotiations with the Union and without regard to the seniority standing of the employees in the affected titles.

Neither of the existing contracts applicable to the titles involved herein specifically covers the manner in which layoffs due to budgetary factors are to be accomplished. The Union asserts that this item was not raised as an issue during the negotiations out of which the current agreements arose, but that "there now has arisen, by reason of a nascent budgetary crisis, a significant change in the circumstances of the affected employees involved herein, which could not reasonably have been anticipated at the time the collective bargaining agreements were executed."

The Union further alleges that the City's unilateral termination of employment has caused "an adverse practical impact upon employees in the bargaining units of the two titles involved in that some of the employees, who, because of the absence of the applicability of seniority or like principle, stand to lose jobs they otherwise would retain." It is the Union's position that layoffs in inverse order of seniority and other procedures related to the way in which layoffs are to be effectuated do not interfere with management prerogatives as prescribed in §1173-4.3b of the NYCCBL and are, therefore, mandatory subjects of bargaining.

In its Answer, the City denies that the terminations of various Assistant Real Estate Repairmen and Senior Addiction Specialists were arbitrary, and argues further that whether or-not these terminations were arbitrary is irrelevant to a determination as to whether terminations of non-competitive employees is a mandatory subject of bargaining.

The City denies that the terminations resulted in an adverse practical impact on any employee and again contends that, under the Board's Decision B-9-68, the existence of a practical impact is irrelevant to the scope of bargaining question involved herein.

As an affirmative defense, the City alleges,.that the matter of layoffs, including implementation of layoffs in inverse order of seniority, is outside the scope of

mandatory collective bargaining within the meaning of §1173-4.3 of the NYCCBL. Additionally, the City contends that even if layoffs were within the scope of mandatory bargaining, §1173-7.0a(3) of the NYCCBL precludes the Union from requiring the City to bargain at this time. The City requests, therefore, that the Board dismiss the Union's petition.

In its Reply, dated January 31, 1975, the Union recites the holding in Board of Education v. Associated Teachers of Huntington that the obligation to bargain on all terms and conditions of employment is broad and unqualified, and may be limited only by a statutory prohibition. Citing several PERB decisions, the Union states, "a public employer is required to bargain on the impact of its decision to eliminate positions even where the employer contends that no impact existed."

The Union claims that it has not challenged the City's right to lay off employees or curtail services. The sole issue, contends the Union, is whether items pertinent to the impact of management's decision and to unforeseeable changed circumstances fall within the scope of mandatory collective bargaining. Such items as notice of intended layoffs, order of layoffs, severance pay, and workload of remaining employees are, according to the Union, mandatorily negotiable under decisions of PERB and various state courts.

Finally, the Union refers to a proposal it has presented which would require the City to place the affected

employees herein into other that are funded through the Federal Comprehensive Employment Training Act. This proposal, alleges the Union, is equivalent City positions a "subject matter of impact" and, therefore, mandatorily bargainable.

By letter, dated March 10, 1975, the office of the Labor Relations requested-permission to file a brief and to argue orally before the Board with respect to the matters raised by the Union's Petition and the City's Answer. The Board granted the City's request and oral argument was held on March 24, 1975. At the oral argument, the parties requested and were granted opportunity to submit briefs. The Union submitted its brief on April 23, 1975. The City's brief was submitted on May 14, 1975.

The Union, in oral argument, cited decisions of PERB and agencies in. other jurisdictions, which hold that there is no duty to bargain on management's decision to terminate employees, but that there is a duty to bargain with respect to the impact of such decisions on the employees affected.

The Union also argued that Section 1173-7.0a(3)[1]of

[1] Section 1173-7.0a(3) states:
"Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreements arose and (b) there shall have arisen a significant Change in circumstances with respect to such matter, which could not reasonably have been anticipated by both parties at the time of the execution of such agreement."

the NYCCBL requires bargaining in this instance on the impact of the City's decision to lay off employees because of the unforeseen budgetary crisis.

With respect to finality in impact bargaining, the Union's Counsel argued that in the event that the parties failed to reach agreement on impact issues related to a City decision to lay off employees, the dispute should ,be submitted to an impasse panel. The Union stated that resort to an impasse panel need not precede the effectuation of the layoffs, although negotiations should take place before the effective date of the layoffs.

The City, in oral argument, contended that the impact of layoffs, to the extent that it is bargainable, is a City-wide issue. Thus, "the matter of whether layoffs are going to be on a seniority basis for those who are not covered by the Civil Service Law is a matter which should be uniform for everybody, but that the seniority should be according to title ...." (T. pp.35-36).

With respect to Section 1173-7.0a(3) of the NYCCBL, the City argued first that the provision is permissive because it uses the word "may" rather than "shall". In the City's view, this statutory provision "is like a zipper clause for the City; unless there is mutual consent, neither side can force the other to bargain during a contract. Any PERB cases that hold to the contrary are inapplicable, according to the City, because the Taylor Law does not contain a provision similar to Section 1173-7.0a(3). The City also pointed out that Section 1173-7.0a(3) conceivably

"could cut two ways." If the Board were to hold that Section 1173-7.0a(3) requires bargaining during a contract on matters arising due to unforeseen, changed circumstances, the City could at some point announce that it was in severe fiscal straits, which it did not earlier anticipate, and demand bargaining about reducing employees' wages and benefits.

Third, the City contended that the impact of layoffs is not an unforeseen issue because during the last City-wide negotiations, the Union, seeking protection against the impact of any future layoffs, presented two demands dealing with that subject. The Union's Demand #20 in the 1973-76 City-wide negotiations was for unemployment insurance, and its Demand #138 was for severance pay.

As to the broad question of impact bargaining over the exercise of managerial prerogatives, the City emphasized that there are "different kinds of impacts," as demonstrated by the Firefighters decision (B-9-68), the MEBA decision (B-3-75), and the PBA decision (B-5-75). In MEBA, the Board held that a per se impact is implicit in the exercise of the managerial prerogative to lay off employees. Thus, a demand during contract negotiations for a provision dealing with the impact of layoffs was determined to be a mandatory subject of bargaining. On the basis of this decision, the City contends that if a layoff creates a per se impact, "because it's per se, it's foreseeable and can be negotiated about [only] during the term of an open contract: (T. p.28)

According to the City, impact of layoffs, bargainable during contract negotiations, must be distinguished from other kinds of practical impact:

> "When you come to a situation where safety is involved, you [the Board] have said to us in the PBA case, you can't tell about-safety all the time during the open term of a contract. So if the City decides to exercise a managerial prerogative during the term of a contract ..., the City has to inform the Union what it's going to do. And if the Union wants to claim impact during the term of the contract, when you come to a safety issue that-was not foreseeable, you are going to have to show us, the Board of Collective Bargaining, that there is an impact on safety.
>
> And when it comes to the question of layoff's impact on remaining employees ..., in B-9-68, you have said you have to show us, the Board of Collective Bargaining, that there is an impact, the City should have the right to alleviate that impact, if . . . they have not .... then you have o sit down and negotiate on it." (T. pp. 28-30).

Thus, the City argued that the question of layoff impact must be divided into two parts: the per se impact, which affects employees who are to be laid off, and which is bargainable only during open contract negotiations, and any resulting impact, which affects remaining employees, of and which can only be negotiated during the term of the contract, or at any time, pursuant to the proceedings set forth in Decision B-9-.68.

The City also urges the Board to find the Union's demand for layoff procedures a non-mandatory bargaining

subject on the basis of the NYCCBL'S finality provisions. Under the NLRA and the Taylor Law, if the parties bargain on layoff procedures and fail to reach agreement, the employer may act unilaterally, having satisfied his legal obligation by merely informing and negotiating with the Union on those issues related to the layoffs. But under the NYCCBL, unresolved issues are submitted to an impasse panel, whose decision can become final and binding upon the parties.

The Union, in its Brief, reiterates and expands upon the issues it discussed at the oral argument. First, it concedes that "City-wide bargaining constitutes an appropriate level for the conduct of negotiations on subject matters of impact arising because of layoffs." The Union states that it

> "... has no objection to the enunciation by the Board of a general rule to this effect and to a determination by the Board that the facts involved in the instant proceeding are such as to justify an order directing the City to negotiate with the Union on a City-wide level."

The Union reiterates that several PERB decisions[2]

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[2] Matter of City School District of New Rochelle, 4 PERB 3704 (1971); North Babylon Free School District, 7 PERB 3040 (1974); Central School District =4 and Bell port Teachers A'ssn., 6 PERB (1973); City of White Plains, 5 PERB 3113 (1972).

hold that there is a duty on the part of the employer to bargain on impact matters where there is a termination of work, abolition of positions, or curtailment of functions,
whether or not such impact occurs during negotiations for a successor contract or during the contract's mid-term.

In response to the City's contention that the Union's petition should be denied because it did in fact bargain on layoffs during the 1973-76 City-wide negotiations, the Union states that the demands for severance pay and unemployment insurance, which were raised in bargaining, did not arise out of a decision of the City which resulted in layoffs or employees to be laid off.

> "In other words, those negotiations took place absent impact.... The City-wide negotiations, therefore, were not those which transpired specifically because the City carried out a public mission to lay off employees or because it exercised a management prerogative. The demand for negotiations in the present case, however, arises precisely because of the implementation by the City to lay off [sic] the non-competitive employees involved in this proceeding...."

Disagreeing with the City's interpretation of the MEBA decision, the Union claims that at most B-3-75 holds that a per se practical impact will be deemed to have occurred whenever the employer lays off employees, "despite the fact that the issue of job security may or may not have been treated with prior to the impact." Under MEBA, argues the Union, the City must bargain immediately upon a demand by the Union for negotiation. Moreover, the duty to bargain

exists if a management action results in an impact during the life of the contract. "What the City overlooks," states the Union, "is the fact that impact arises solely by reason of the exercise of a management prerogative...."

In its Brief, the City argues, preliminarily, that the Union's Petition should-be dismissed on procedural grounds inasmuch as the Union's Petition and Reply were unverified (in violation of OCB rules), and the Reply contained "allegations of a violation of a section of the NYCCBL not alleged to have been violated in the original unverified petition, all in violation of the Rules of OCB."

As a substantive argument, the City alleges that the impact of layoffs on Career and Salary Plan personnel can be negotiated only on the City-wide level. Thus, there seems to be no dispute between the parties on this point. The City argues further that since bargaining over the impact of layoffs is a City-wide matter, the Union's demand to bargain over the practical impact of layoffs on employees in only two titles is not negotiable, and is logically incompatible with the Union's own position on the appropriate level of negotiations.

The City also maintains that the Union's demand concerning order of layoffs of all non-competitive titles in the Career and Salary Plan may appropriately be made only during negotiations for a new collective agreement. Under the Board's decisions, particularly MEBA (B-3-75), notes the City, managerial actions that are both foreseeable at the

time of contract renewal negotiations and that would have a per se impact when exercised, are bargainable during the renegotiation period. The City also points out that the Board has decided that "where a managerial decision raises an unforeseeable [sic] impact (such as one which affects workload or safety in a way-that could not be foreseen at contract negotiations time), the impact of such a decision becomes negotiable (after determination by the Board that practical impact does exist and the City cannot .alleviate it in a reasonably prompt manner) at the time the decision is put into effect. (City of New York and UFA, Local 94, B-9-68; City of New York and Patrolmen's Benevolent Association, B-5-75)."

According to the City, the scheme of Board decisions is that bargaining over the practical impact of management decisions must take place:

> "(a) during contract negotiations (or initial negotiation where no contract exists) when the managerial decision is foreseeable [sic] and ... creates an indisputable (per se) impact (e.g. layoffs).
>
> (b) during contract renegotiation when the managerial decision is announced (and therefore foreseeable and the BCB has declared, following a hearing that a safety impact will exist if the decision is implemented.
>
> (c) during mid-contract when the managerial decision has been unforeseeable, the BCB has declared an impact after hearing, and the City has failed to relieve the impact (e.g. B-9-68 cases).

> (d) during mid-contract when the managerial decision had been foreseeable, but the practical impact not ascertainable until implementation has occurred.

The City argues that PERB's North Babylon decision is distinguishable from the instant case because the Taylor Law does not contain a provision similar to §1173-4.3(b) of the NYCCBL. In North Babylon, PERB held that the impact of layoffs is mandatorily negotiable when the layoffs occur. In the City's view, the BCB has "implicitly decided that under §1173-4.3(b), the appropriate time to negotiate over a foreseeable [sic] managerial decision which has a per se impact is at open contract negotiations."

The City further argues that even if the practical impact of layoffs were negotiable during mid-contract, D.C. 37 has waived its right to bargain on the practical impact of layoffs as a result of the negotiations for the 1973-76 City-wide Contract. In those negotiations, the Union demanded a severance pay fund and an agreement by the City to elect coverage under the terms of the optional election provisions for municipalities of the New York State Unemployment Insurance Law. Both of these demands were rejected by the City or fact finders.[3]

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[3] In its Brief, the Union stated that its demands in City-wide bargaining for severance pay and unemployment insurance did not arise out of a City decision to lay off employees. Moreover. "no Union demand during City-wide contract negotiations was ever made for negotiation of impact" with respect to specific, laid off employees. In response to this statement, the City maintains that during the City-wide bargaining, D.C. 37 stated that it foresaw and feared massive

[3] continued

on those who might in the future be laid off. "Whether D.C. 37 is free to now bargain over a certain layoff related demand cannot

DISCUSSION

Impact Bargaining- The Private Sector

Although, as we have previously noted private sector precedents are not binding upon this Board, the bargaining requirements under the NLRA and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the NYCCBL.

There is a long line of cases in the private sector holding that although an employer may unilaterally decide to lay off employees for economic reasons, the effect of its decision on employees is a mandatory subject of bargaining. In NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (CA 9, 1967), the Ninth Circuit held that the decision of a ship terminal operator to relocate and lay off employees was not a mandatory subject of bargaining. The court emphasized, however:

> "...the employer is still under an obligation to notify the union of its decision so that the union may be given the opportunity to bargain over the

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be based upon the number or specificity of layoff related impact demands it raised in negotiations; otherwise a demand now for an additional two weeks of terminal leave could be argued to be negotiable because it is not precisely the same as the Union's demand for $300 per year, per employee to be put into a severance pay fund. The point is that impact related to layoffs was raised, negotiated over and lost by the Union which now seeks to return to the table to reopen unsuccessful negotiations."

> rights of the employees whose employment status will be altered by the managerial decision .... Such bargaining over the 'effects' of the decision on the displaced employees may cover such subjects as severance pay, vacation pay, seniority, and pensions, among others, which are necessarily of particular importance and relevance to the employees."

The Second Circuit decided similarly in NLRB v. Rapid Bindery, Inc., 293 F. 2d 170 (CA 2, 1961) . It affirmed an employer's right to decide unilaterally to move its plant and terminate employees. But once that decision is made, Section 8(a)5 requires that notice of it

> "be given to the union so that the negotiators could then consider the treatment due to those employees who conditions of employment would be radically changed by the move. Nothing affects conditions of employment more than a curtailing of work, and such a curtailment is properly the subject of collective bargaining."

In summary, at least seven circuit court decisions have held that here is no duty to bargain about managerial decisions involving layoffs for economic reasons such as plant closings, partial plant shut-downs, plant relocations, changes in production procedures, and certain subcontracting arrangements when the decision was made free of animus toward the union. (See NLRB v. Rapid Bindery, Inc., 293 F. 2d 170, 48 NLRM 2658 (CA 2, 1961); NLRB v. Adams Dairy, 350 F. 2d 108, 60 NLRM 2084 (CA 8, 1965), cert. denied, 382 U.S. 1011 (1966); NLRB v. Royal Plating and

Polishing Co., 350 P. 2d 191., 60 LRRM 2033 (CA 3, 1965) NLRB v. Transmarine Navigation Corp.; 380 F. 2d 933, 65 LRRM 2861 (CA 6, 1967); NLRB v. Dixie Ohio Express Co., 409 P. 2d 10, 70 LRRM 3336 (CA 6, 1969); NLRB v. Thompson Transport Co., Inc., 406 F. 2d 6981 70 LRRM 2418 (CA 10, 1969) ; NLRB v. United Nuclear Corp., 381 F. 2d 972, 66 LRRM 2101 (CA 10, 1967).

But it is also well settled under these decisions that the effects, or impact, of management decisions upon employees are mandatory subjects of bargaining.

Bargaining During the Term of an Existing Agreement - The Private Sector
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In the private sector, the NLRB and courts have held that collective bargaining is not limited to negotiation of an agreement.

A landmark decision on this subject is NLRB v. Jacobs Mfg. Co., 196 F. 2d 680 (CA 2, 1952). In this case, the Second Circuit, interpreting the bargaining exception contained in Section 8(d) of the NLRA, elaborated on the issues open to negotiation during the life of a contract. Section 8(d) provides, in relevant part, that the duty to bargain collectively "... shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

The Second Circuit held that although the Section 8 (d) exception was intended to give stability to agreements,,

> "... we do not think it relieves an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract."[4]

The NLRB has also held that the duty to bargain during the life of the agreement may even exist with respect to items that were discussed during negotiations and subsequently abandoned. In Beacon Piece Dyeing and Finishing Co., 121 NLRB 953 (1958), the employer was found to have violated §8(a)(5) by unilaterally increasing employees' workloads, a mandatory subject, even though the employer contended that the Union waived its right to bargain on that subject because in collective negotiations, it had dropped a demand for freezing a workload ceiling into the contract in return for employer concessions elsewhere. The Board observed that it

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[4] See also Allied Mills, Inc., 82 NLRB 854, 23 LRRM 1632 (1949). With respect to mid-contract bargaining, the Board held:

> "As to the written terms of the contract either party may refuse to bargain further about them ... without committing an unfair labor practice. With respect to unwritten terms dealing with 'wages, hours, and other terms and conditions of employment,' the obligation remains on both parties to bargain continuously."

> "... has consistently held that an employer's action in changing the wage rates or other working conditions of its employees without notice to, or consultation with, the labor organization which they have chosen to represent them is in derogation of its duty io, bargain and is violative of Section 8(a)(5). Moreover, although the Board has also held repeatedly that statutory rights may be 'waived' by collective bargaining, it has also, said that such a waiver 'will not readily be inferred' and there must be 'a clear and unmistakable showing' that the waiver occurred."

The Board concluded that the mere abandonment of a bargaining demand in return for other concessions did not meet the established waiver test. Nor did it represent a union acquiescence "in any management prerogative position on workload so as to 'hand over' to the Respondent the Union's statutory bargaining rights on workload."

In general, the NLRB is reluctant to find a waiver of bargaining rights "unless it can be said from an evaluation of the prior negotiations that the matter was 'fully discussed' or 'consciously explored' and the union 'Consciously yielded' or clearly and unmistakenly waived its interest in the matter." (Press Co., Inc., 121 NLRB 976, 42 LRRM 1493 (1958).

Thus, the private sector case law holds: 1) effects of managerial decisions resulting in layoffs are mandatory subjects of bargaining; and 2) even during an existing agreement, an employer may not act unilaterally on a mandatory subject (i.e., term and condition of employment)

that is not embodied in the agreement. Unless the union has expressly waived its bargaining rights, it must be afforded the opportunity to bargain on management's announced action regarding such mandatory subject.

Bargaining on Layoffs - The Public Sector

While agency and court decisions of other jurisdictions are predicated upon interpretations of the public employee bargaining statutes existing in those jurisdictions, and are therefore not binding upon this Board, the determinations of other tribunals on the negotiability of layoff procedures may be instructive.

The Wisconsin Employment Relations Commission, in City of Beloit and Beloit Education Association, Case V, No. 16732 DR (M)-43, Decision No. 11831-C, (1974) , 578 GERR B-11 (10/28/74), determined the negotiability of a teacher proposal on layoffs. The Commissioner held:

> "The matter of teacher layoffs and their right to recall to active teaching status, have a direct and intimate affect (sic) on a teacher's working conditions including employment status, and as such, the Commission concludes that the proposals relating to teacher layoffs and recall are mandatory subjects of bargaining, as are concomitants thereof, not limited to, but including such matters as the basis for layoffs, order of recall, qualifications for recall, and non-loss or previous service credits."

In Fire Fighters Union Local 1186 IAFF v. City of Vallejo, 12 Cal 3d 608, 116 Cal Rptr 507, 87 LRRM 2453, (1974), the California Supreme Court, interpreting the Vallejo City Charter provisions governing public employee labor relations, held that a union proposal on personnel reduction was arbitrable to the extent it affected employees' working conditions and safety.

The Court concluded that a management decision to lay off was a "matter of policy of fire prevention" which was not a mandatory subject of bargaining and, therefore, not arbitrable. But with respect to the other elements of the union's proposal, the Court found:

> "... because of the nature of fire fighting, a reduction of personnel may affect the fire fighters' working conditions by increasing their work-load and endangering their safety.... To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration...."

Additionally, the Court ruled that "Matters of seniority and reinstatement included in the Personnel Reduction proposal are arbitrable."

The concept of impact bargaining is familiar under both the NYCCBL and Taylor Law. Section 1173-4.3b of the NYCCBL specifically grants employee representatives the right to bargain on "questions concerning the practical impact" on employees of managerial decisions. The Board of Collective Bargaining first defined "practical impact" in Decision B-9-68. Since that time, it has rendered several decisions

dealing with practical impact, and recently, as evidenced in the MEBA decision, has been reconsidering its policies and procedures regarding practical impact.

The scope of bargaining, as set forth in the Taylor Law, does not expressly include the "practical impact" of exercises managerial prerogatives. PERB and the courts, however, have developed the concept of impact bargaining in a series of cases dealing with the scope of bargaining.

First, the breadth of the statutory phrase "terms and conditions of employment" was defined by the Court of Appeals in Board of Education, Huntington v. Teachers, 30 NY 2d 122 (1972). The court held:

> "Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment."

Particularly relevant to the instant case are PERB's decisions in City School District of the City of New Rochelle and New Rochelle Federation of Teachers, 4 PERB 3704 (1971); City of White Plains and Professional Fire Fighters Association, 5 PERB 3031 (1972); and City of Albany and Albany Police Officers Union, 7 PERB 3078, at 3132 (1974).

In New Rochelle, PERB determined that a managerial decision to approve budgetary cuts resulting in reduction of the work force is a non-mandatory subject. "The employer

is obligated, however, to negotiate on the impact of such decision on the terms and conditions of employment of the employees affected.” In White Plains, PERB held that a union demand that the employer not reduce the work force is a non-mandatory subject. PERB reiterated, however, that there is a duty to bargain on the impact of a decision to curtail service; or abolish positions. “Examples of such negotiable matters are order of lay-off, severance pay, and workload for the remaining employees. These and other matters of impact are mandatory subjects of negotiations.”

PERB most recently considered the negotiability of layoffs in its Albany Police decision.. In that case, the union had presented several demands relating to job security, re-employment rights and layoff procedures. Those demands that were covered by Civil Service Law or that abridged managements right to curtail services and eliminate positions were held to be non-mandatory. With respect, however, to union demands relating to layoff procedures and requiring reasonable-notice prior to implementation of a managerial decision to lay off, PERB held that there was neither conflict with the Civil Service Law nor undue interference with a public employer’s right to eliminate a services.[5] According to PERB, “a provision for reasonable notice

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[5] The specific layoff demands determined by PERB to be mandatory subjects included the following:

Section 5. Lay-off

(a) In the event the Employer plans to lay off employees for any reason, the employer shall meet with the Union to review such anticipated layoff at least thirty (30) days prior to the date such action is to be taken.

[5] continued

(c) The Employer shall forward a list of those employees being layed off to the local union secretary on the same date

of the implementation of such decision is not unreasonably related to the requirement that a public employer negotiate over the impact of such decisions."

Our own MEBA decision, B-3-75, supports the theory that the impact of a managerial decision to lay off employees is a mandatory subject of bargaining. We held in that decision that practical impact on those laid off or to be laid off is implicit in any exercise by management of its prerogative to lay off,

> "... and wherever the employer exercises this particular power, a practical impact will be deemed

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that the notices are issued to the employees.

(d) Employees to be laid off will have at least thirty (30) calendar days notice of layoff.

(e) All employees who have been laid of shall be placed on a recall list.

(f) The Employer will be liable for any error on a layoff from the date of the error.

Section 7. Consolidation or Elimination of Jobs
(a) It is understood and agreed that the employer will notify the Union immediately, in writing, of any decisions involving a change in its facilities or operations, whether such decision involves expansion, partial or total closure, or termination of any facilities or operations, a consolidation, or a partial or total relocation or removal of any facilities or operations.

> to have occurred and to have been established.
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> * * * *
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> With respect to those issues over which the employer has discretion to act, and which relate to the practical impact of a managerial decision to lay off employees, the City is obligated to bargain immediately."

Bargaining During the Term of an Existing Agreement - The Public Sector

Admittedly, the scope of bargaining questions in the MEBA case arose during negotiations for a successor agreement to one that had expired. The difficult problem in the instant case is to determine whether the impact of a managerial decision to lay off employees is a mandatory subject of bargaining during the life of a contract which is silent on the issue of job security.

PERB confronted a similar problem in North Babylon Union Free School District and North Babylon Teachers Organization, 7 PERB 3040 (1974). In that case, the Teachers Organization charged that the employer abolished a number of teaching positions during the term of the contract and refused to negotiate on the impact of such action on terms and conditions of employment.

In response to the employer's contention that the job eliminations did not create an impact, PERB held that an employer may not avoid a duty to bargain by making a unilateral decision that there is no impact flowing from its action. Upon request, the employer must meet and

discuss the issue of impact; the act of discussing does not constitute a concession on the employer's part that there is an impact on terms and conditions.

PERB also found unpersuasive the employer's argument that since effectuation of layoffs did not violate any provision of the existing contract, there was no duty to bargain on impact. PERB concluded:

> The duty to negotiate does not terminate upon the execution of a collectively negotiated agreement. It continues during the term of the agreement. For example, an employer has a duty to negotiate grievances which arise during the term of the agreement. Further, absent an explicit waiver, an employer may not alter a term and condition of employment which is not covered by the agreement. Finally, an employer does have a duty to negotiate upon request as to terms and conditions which are not provided for in the contract if the employee organization, as here, has not waived its right to do so.

The Application of Section 1173-7.0a(3)

The Union bases its bargaining demand, in part, on Section 1173-7.0a(3) of the NYCCBL. The Union claims that the City's budgetary crisis has resulted in a "significant change in the circumstances of the affected employees involved herein, which could not reasonably have been anticipated at the time the collective bargaining agreements were executed." The City contends, however, that even if layoff procedures were within the scope of mandatory bargaining, Section 1173-7.0a(3) precludes bargaining at this time.

Because we dispose of the bargainability issues raised in the instant proceeding on the basis of Section 1173-4.3 (a) and (b) and our interpretation of the statutory language on the application of practical impact, we do no reach the question of the applicability of Section 1173-7.0a(3) to the Union's demand for bargaining on layoff impact subjects. Nor do we rule on the City's position that Section 1173-7.0a(3) allows mid-contract bargaining only upon mutual consent. We make the limited finding, however, that section was not intended to nor does it preclude mid-contract bargaining on the impact of managerial prerogatives.

Terminations of Non-Competitive Titles

The City implies, in its Answer, that there is a distinction between competitive and non-competitive employees with respect to the negotiability of layoff procedures affecting them. It is true that the Civil Service Law and Civil Service Commission Regulations deal differently with competitive and non-competitive titles. Whereas the rights of competitive class employees with respect to job security are governed and protected to a considerable extent by Sections 80 and 81 of the Civil Service Law, non-competitive employees lack similar statutory protection. Where Civil Service Law or Rules and Regulations specifically govern and pre-empt a subject, we have not required bargaining. In the MEBA decision, for example, we determined that the

element of the union's job security demand which sought to achieve re-employment rights was expressly covered by the Civil Service Law and was a non-mandatory subject of bargaining.

While it is true that the non-competitive employees in the instant case are not covered by the job security provisions of Civil Service Law, they are certainly governed by the general provisions of the New York City Collective Bargaining Law, which on its face makes no distinction between the scope of bargaining for competitive and noncompetitive class employees. And inasmuch as the City has not cited any Civil Service Law provisions that specifically govern; and therefore exclude from bargaining, any of the Union's demands with respect to non-competitive employees, we find no basis for limiting our determination herein because of the non-competitive status of the employees involved.

The City Wide Issue

The parties agree that City-wide bargaining constitutes the appropriate level for negotiation of impact matters arising from layoffs. Section 1173-4.3a(2) of the NYCCBL mandates that all matters which must be uniform for all employees subject to the Career and Salary plan shall be negotiated at the City-wide tier. Generally, the Board has been guided by the principle that the most

appropriate level of bargaining is the broadest with certain exceptions.[6] The City points out, "The Civil Service Law guides us by its uniform rule for all competitive civil service employees for layoffs by juniority within each title." And the Union agrees "No cogent reason exists for differentiating between terminated non-competitive employees of different bargaining units in the application of the inverse order of seniority principle within title."

Since both sides concede that methods of layoff should be uniform and, therefore, negotiable at the City-wide level, we dismiss the Union's petition insofar as it demands layoff impact bargaining for only two titles. The Union does not argue that any "special and unique" considerations exist which would warrant title bargaining in the instant case; nor does the Union appear herein as the City-wide representative.

We find the City-wide level an appropriate level for bargaining of the layoff impact-issues raised here. We recognize , however, that there may be special And unique or other considerations which could arise from .layoff decisions and which would warrant a finding that the impact is bargainable at the title level. For example,

[6] One such exception is that contained in §1173-4.3(2), which provides that there may be bargaining for a variation of any City-wide policy where considerations special and unique to a particular department, class of employees, or bargaining unit are involved.

a decision to lay off could affect the workload of remaining employees. Such questions and issues could involve title bargaining over impact.

Although we dismiss the Union's petition herein because it inappropriately seeks to bargain layoff impact matters at the title-level, bur decision is without prejudice to the right of the City-wide representative District Council 37, AFSCME, to initiate bargaining with respect to layoff impact issues. Because D.C. 37 may, as the City-wide representative, seek to bargain City-wide on impact matters in response to the announcement and implementation of additional layoffs by the City, we decide herein the significant legal questions that the parties have raised concerning waiver of bargaining rights, mid-contract negotiations, and the City's duty to bargain over the impact(s) of managerial decisions to lay off employees.

The Waiver issue and the Practical impact of Layoffs

Private and public sector precedents clearly indicate that the duty to bargain on matters of impact stemming from management's exercise of its prerogative to lay off can arise during the life of an agreement. In New Rochelle, PERB held that the employer was required to bargain over the impact of its decision to make budgetary cuts resulting in personnel reductions. And, as discussed above, in North Babylon, PERB adopted a very broad rule with respect to mid-contract impact bargaining: "an employer does have

a duty to negotiate upon request as to terms and conditions which are not provided for in the contract if the employee organization, as here, has not waived its right to do so."

In the instant case, the City alleges that the Union has waived its right to bargain on layoff-related impact issues as a result of the history of City-wide negotiations, specifically, the Union's unsuccessful attempt to gain contract provisions on severance pay and unemployment insurance. We agree with the City that if a Union bargains on layoff impact demands at contract renegotiation time, as is its right under the MEBA decision, it should not be permitted, during the life of the agreement and in response to a management decision to lay off employees, to bargain on those identical demands in an effort to improve upon current contract language or to gain new provisions which it failed to achieve in the prior negotiations. The test to be applied is that which the NLRB enunciated in the Press case, cited above:

> "It is well-established Board precedent that, although a subject has been discussed in pre-contract negotiations and has not been specifically covered in the resulting contract, the employer violates Section 8 (a) (5) of the Act, if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was 'fully discussed' or 'consciously explored' and the union 'consciously yielded' or clearly and unmistakably waived its interest in the matter. (42 LRRM 1493)

In the instant case, the subjects of severance pay and unemployment insurance were raised, negotiated, and submitted to an impasse panel in the City-wide negotiations. Those specific matters, therefore, were carefully explored, and the City is not required to renegotiate them mid contract. The City-wide bargaining did not, however, exhaust the entire area of layoff impact. Other subjects directed to the effect of layoffs were not even raised in the-City-wide negotiations. With respect to those items, there was no "full discussion" or "conscious exploration" as to constitute a waiver of interest on the part of the Union. Therefore, the Union should not be barred from negotiating mid-contract, in response to the City is impact creating decision to lay off, on impact matters not previously bargained.

Although the City contends that the Union has waived its right to bargain mid-contract because it foresaw the layoff crisis and had the opportunity in City-wide bargaining to negotiate on impact issues related to layoff, the Union emphasizes that its City-wide bargaining demands did not arise out of an actual managerial decision to lay off employees. The Union's argument is meritorious because whereas there may be no general duty on the part of the employer to bargain during a contract, there is a duty to bargain if the employer takes action which creates a practical impact on the employees. In other words, in the instant case, while the Union may be barred from

taking the initiative to demand bargaining over the subject of job security during the term of the agreement, and while it may not demand bargaining on the two layoff related issues it previously negotiated, it still has the right to demand bargaining on other layoff items in response to the City's impact-creating decision to terminate employees. The NYCCBL does not limit practical impact bargaining to the period of contract negotiations, and our past decisions have held that if the City exercises a managerial prerogative during the term of an agreement, the Union immediately has the right to claim that a practical impact has resulted. Inasmuch as in MEBA, we held that the exercise of the managerial prerogative to lay off creates a per se practical impact, it logically follows that such impact issues as notice of future intended layoffs, order of lay off, and recall list of terminated employees are mandatorily bargainable immediately upon the Union's demand for negotiations.

The practical impact concept in bargaining under the NYCCBL has to do with considerations both of bargainability of particular subjects and of timeliness of demands for bargaining. It is apparent that the legislative purpose of Section 1173-4.3b of the NYCCBL is to reserve to management the right and freedom to act unilaterally in matters over which it must have discretionary powers in order to accomplish its mission of maintaining effective government. In light of this legislative purpose, we reiterate that a

decision to lay off is not mandatorily bargainable, and that any statutory duty to bargain on matters of impact arising from layoffs shall in no way defeat or frustrate the City's right-to lay off employees.

The purpose of the practical impact language of Section 1173-4.3b. is to provide means of cushioning, or reducing, to the extent possible, the adverse effects upon employees arising from exercises of management prerogatives. It thus may be said that the right to bargain pursuant to Section 1173-4.3b arises only where an exercise of a management prerogative has resulted in a practical impact; the only exception to this rule is in the case of per se practical impacts, which may be anticipated. Thus, in the MEBA case, it was held that a union may demand to bargain as to matters relating to a subject of management prerogative the exercise of which would, per se, constitute a practical impact. In that case, the particular job security demand would have required no action by the employer in advance of the creation of an impact, and the decision did not determine the bargainability of an impact demand which would have required such anticipatory action by management. Aside from the special conditions relating to per se practical impacts, however, management and not the union, has the initiative and the union’s right to bargain comes into existence only after management has acted unilaterally pursuant to Section 1173-4.3b in such a way as to create a practical impact.

The corollary to this rule is, of courser that whenever management takes such action, and regardless of when it occurs with relation to contract periods, the union has the right to allege practical impact and to demand remedial bargaining. The only exception to this rule is where during pre-contract bargaining, a particular subject is negotiated, the union may not demand mid-contract bargaining on the identical subject under a claim of practical impact.

With respect to the instant case, layoffs, clearly, are a subject of management prerogative; related to that management prerogative are a host of subjects of bargaining some of which may bd mandatorily bargainable and others bargainable only on mutual consent of the parties. Two such subjects -- unemployment insurance and severance pay -- were bargained during the last City-wide contract negotiations, and may not be raised now on a practical impact basis. The subjects of notice of layoffs, order of layoff, recall lists of terminated employees, and other matters not dealt with in the City-wide negotiations are now bargainable in connection with the practical impact of layoffs.

We emphasizes, as we have in other scope of bargaining decisions, that our determination herein does not require the City to agree on any Union demand determined to be negotiable, but merely to negotiate, subject, of courser

to the possibility of resorting to an impasse panel. Under the statute, practical impact bargaining is directed toward alleviating adverse effects resulting from the exercise of managerial prerogatives. But neither that nor ultimate resort to an impasse panel would prevent or delay the City from implementing its decision to lay off employees.

Our determination that there is a statutory duty to bargain during a contract on the impact of layoffs requires, however, still further refinement. The Union contends that such issues as notice by the City of intended layoffs, order of layoff, workload of remaining employees, and placement of terminated employees on non-City funded lines are all matters of impact flowing from layoffs and are mandatory bargaining subjects "upon demand" for negotiations. The City argues that layoffs generate different kinds of impacts which are subject to different bargaining rules under our case law on practical impact. We agree that there is a distinction between the impact of layoffs on employees laid off (or to be laid off) and the impact of layoffs on the workload of remaining employees. Whereas in MEBA, we declared the former to be a per se impact, we did not in that decision deal with the impact of personnel reductions on remaining employees. The City correctly points out that layoffs do not necessarily produce an impact on the workloads of remaining employees, especially if the City reduces the service to the public. Therefore, a Board determination requiring immediate bargaining on that

demand would be premature. If, subsequent to the issuance of this decision, there is a demand to bargain about the effects of layoffs on remaining employees, we will deal with the issue at that time, and if necessary will require an evidentiary hearing in order to determine whether a practical impact has, in fact, resulted from the implementation of layoffs.

The Union argues that its demand requiring the City to place laid off employees into City positions that are funded through the Federal Comprehensive Employment Training Act be treated as any other bargainable matter related to the impact of the City's decision to lay off employees. The City's authority, however to bargain and agree to contract language concerning CETA jobs may be limited by the federal Act, regulations or guidelines. Because we do not have sufficient information on this Union proposal, we will limit the City's duty to bargain to the extent of its discretion under CETA.

DETERMINATION

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

DETERMINED, that the petition of the Union as title representative be, and the same hereby is, dismissed. This determination is without prejudice to the right of the Union as City-wide representative to proceed to bargain with respect to layoff impact issues, consistent with the opinion set forth herein.

DATED: New York, N.Y.
June 16, 1975

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

EDWARD F. GRAY
MEMBER

JOSEPH J. SOLAR
MEMBER

I concur in dismissal only.

THOMAS F. ROCHE
MEMBER

I concur in dismissal and agree that the appropriate bargaining level is City-wide. I believe, however, that a full hearing is required on the question of past City-wide negotiations covering discharges such as these. In the absence of such hearing, I must concur in dismissal only.

VINCENT D. McDONNELL
MEMBER