City v. UFOA, 15 OCB 22 (BCB 1975) [Decision No. B-22-75 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

CITY OF NEW YORK,

Petitioner

DECISION NO. B-22-75

-and-

DOCKET NO. BCB-220A-75

UNIFORMED FIRE OFFICERS ASSOCIATION,

Respondent

DECISION AND ORDER

On April 16, 1975 the City of New York filed its amended petition herein requesting that the Board of Collective Bargaining declare that "paid release time for union activities" is "outside the scope of collective bargaining," and requesting an expedited determination.

The Union's Answer, filed on April 23, 1975 contended that the Board has no jurisdiction in the matter by reason of the pendency of an improper practice case before PERB filed by the Union against the City, alleging a refusal to bargain on this subject.

The City's expedited Reply was filed on April 2 and both parties filed briefs.

The controversy between the parties arises from the City's reinterpretation of Executive Order 75, effective April 16, 1975, so as to reduce the number of Fire Officers permitted to be assigned to labor management assignments from nine men to three men assigned full time, two men assigned

part time, and two assigned on leave without pay. The parties are in a period of negotiations, and the "status quo" provision of the NYCCBL applies (Section 1173-7.0d).

CONTENTIONS OF THE PARTIES

The City contends that the Board of Collective Bargaining has exclusive jurisdiction to determine scope of bargaining questions under the NYCCBL. To the extent that the Union's charge before PERB alleges a refusal to bargain for the exclusion of paid release time for union activities in the next collective bargaining agreement, the Board should decide whether that demand is within the scope of bargaining under the NYCCBL.

The City also claims that the matter of paid release time for union activities is not a mandatory subject of bargaining under the NYCCBL. It is a permissive subject because it involves assignment of employees during paid working hours.

The City further argues that to the extent that the Union's charge before PERB alleges a refusal to bargain by reason of the City's unilateral action during the status quo period, the question is governed by the contract. It is the City's position that Executive Order 75 is an implied term

of the contract and that the revocation of release time assignments was proper under the Executive Order.

Finally, the City contends that the Board of Collective Bargaining is not bound by PERB decisions holding that paid release time for union activities is a mandatory subject of bargaining. The basis for this contention is that the NYCCBL contains a management rights clause which is not incorporated into the Taylor Law.

The Union argues that PERB has exclusive jurisdiction to remedy improper employer practices, including a refusal to bargain; the Board of Collective Bargaining, therefore, has no jurisdiction in the instant matter. The Union also urges the Board to decline to assert jurisdiction in the case because the charge with PERB was filed prior to the City's filing its petition with the Board. Additionally, the Union asserts that the Board lacks authority to remedy the underlying dispute; thus, a decision on its part would merely be an academic exercise.

The Union points out that the issue of paid release time has been held by PERB to be a mandatory bargaining subject. In the Albany Police case, 7 PERB 3132 (1974), PERB held that a demand granting employees "time off with pay while engaged in work on behalf of the organization" was a mandatory subject

of bargaining. In the union's view, the City's unilateral action changing the number of UFOA officers on paid release time is an improper practice because the subject is a mandatory matter for negotiations.

The Union also contends that Executive order 75 is not incorporated into the contract between the parties. Rather, the number of men previously on paid release tine is an implied term of the collective agreement.

By letter of May 27, 1975, the UFOA urged the Board to defer action until PERB has disposed of the improper practice case before it. On the same day, the Union requested expedited consideration from PERB.

By letter of May 30, 1975, the City opposed the UFOA request to PERB for expedited relief; and on the same date, by letter to Chairman Anderson, the City again urged the Board not to defer to PERB in this matter.

For the reasons set forth below, we believe that we have jurisdiction over the instant matter and render a determination on the City's petition herein.

JURISDICTION OF THE BOARD

While PERB has exclusive jurisdiction to remedy improper practices, the authority of the-Board of Collective Bargaining to render scope of bargaining determinations has never been abrogated. Section 1173-5.0a(2) of the NYCCBL provides:

> "The Board of Collective Bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
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> * * *
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> (2) on the request of a public employer or certified or designated employee organization to make a final determination as to whether a matter is within the scope of collective bargaining."

We have such a request before us in the instant matter, and we believe it is our duty to deal expeditiously with the parties' controversy as to the bargainability of paid release time.

We have considered the Union's argument that the Board's assertion of jurisdiction herein would be an interference with PERB's jurisdiction to deal with the improper practice charge currently pending before it. We considered a similar claim, although in a different context, in City of New York and Patrolmen's Benevolent Association, Decision No. B-5-75, and we believe the language of that case is applicable here:

> "Although the failure of the State Legislature to continue OCB jurisdiction over improper practices has rendered impossible a proceeding under Subparagraph (4) of §1173-5.0a, it has not affected our jurisdiction pursuant to subparagraph (2) which provides a separate and distinct type of proceeding. Similarly, 5205.5(d) of the Taylor Law establishes procedures to deal with improper practices as defined in §209-a, including a refusal to negotiate in good faith.' We do not read this language as depriving this Board of jurisdiction in this case inasmuch as we have request from one of the parties for a determination as to scope of bargaining. There is nothing in the State statute to indicate that OCB does not retain all of the powers conferred upon it by law except the power to deal with improper practice."

BARGAINABILITY OF PAID RELEASE TIME

In the Albany Police case, 7 PERB 3132(1974), PERB considered the bargainability of a demand for "time off with pay while engaged in work on behalf of the organization." It concluded that:

> " . . . this is a mandatory subject of negotiations.. The ability of an employee organization to provide effective representation to its constituency is predicated upon having employee leaders of the organization available to devote time to the work of the organization. The question of whether or not such employee leaders are to be compensated, and, if so, how much, are mandatory subjects of negotiations."

Section 1173-2.0 of the NYCCBL declares it to be the policy "to favor and encourage the right of municipal employees to organize and be represented."

In City of New York v MEBA, Decision No. B-3-75, the Board found that a demand for release time for labor relations and union activities was a mandatory subject of negotiations. Discussing the City's contention that the demand would infringe on the managerial prerogative and was thus a voluntary subject of bargaining, the Board said:

> "The use of working time by employees for the conduct of labor-management relations can be considered a fundamental subject and an essential part of the right to bargain collectively. We equate this subject with the grievance procedure which, though manifestly and undisputedly a mandatory bargaining topic, was at one time the subject of mayoral executive order. The investigation and processing of grievances by union representatives and their participation in labor-management meetings and in the negotiation of collective agreements are part and parcel of the collective bargaining framework established by the New York City Collective Bargaining Law; as such, they can be considered terms and conditions of employment.

In MEBA, the Board did not reach the question of whether paid release time was also a mandatory subject of negotiations. That issue is presented in the instant case.

We find that paid release time for the conduct of labor management relations activities is a mandatory subject of bargaining under the NYCCBL. In furtherance of the

policy favoring and encouraging the right of public employees to organize and be represented, the parties should be required to bargain over the issue of release time for union activities including the issue whether union representatives should continue to be paid while they are engaged in such activities.

A demand for paid release time to conduct union activities which significantly and materially affect the bargaining relationship and which serve to further the policy favoring sound labor relations is a mandatory subject of bargaining. Thus, it is clear that activities such as participation in negotiations and grievance proceedings and membership on labor management committees are activities which are significantly and materially related to a collective bargaining relationship and are necessary to sound labor relations between the parties.

We note that certain types of union activity may not meet the test of significantly and materially affecting the collective bargaining relationship and they may not affect the mutual interest of the parties to collective negotiations. A demand for paid release time to conduct such union activities, would not be a mandatory subject of bargaining.

For example, union participation in electoral politics or in meetings or conventions relating to internal union matters do not have such a significant and material relationship to collective negotiations between the parties, and a demand for paid release time to engage in those activities would not be a mandatory subject of bargaining. This view is consistent with the current practice under Executive Order 75, as amended by Executive Order 6 (January 21, 1974), which permits participation in union organizational and publicity efforts only on unpaid time, and it is consistent with the State of New York guidelines which prohibit organizational activities during paid working time.* Under Executive Order 75, as amended by Executive Order 6, paid release time is granted for activities including the investigation and processing of grievances; participation in meetings of departmental labor-management committees; negotiations with the Office of Labor Relations; service as members of a City Pension Board or the Municipal Labor Committee; participation in collective bargaining impasse proceedings; and attendance, as employee representatives, at the funerals of employees killed in the line of duty. Unpaid release time is granted for such union activities as organization and attendance at union meetings, conferences, or conventions; recruit-

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* The State Guidelines for Employee Organizational Activities and Campaigns, issued on June 23, 1975, contains the following provisions:

ment of union membership; solicitation of members; collection and/or recording of union dues; preparation and distribution of union literature; conferences with or appearances before state and federal legislative committees; and holding of press conferences.

The foregoing examples are not intended to be exhaustive. We believe that the parties themselves should attempt mutually to determine which labor management relations activities should be eligible for paid release time. Of course, the processes of the Board will be available to resolve any further bargainability issues that may arise.

Continued

Meetings

"The State will not make meeting space in buildings or areas which it owns or leases available to an employee organization for campaign purposes except under the following conditions: (a) suitable space is not reasonably available elsewhere in the area, (b) the employee organization reimburses the State for any costs which the State incurs as a result of making such space available, and (c) the organization requests the use of such space in advance, pursuant to the rules of the department or agency concerned.

"No employee shall be released from work for the purpose of attending such meetings."

Organizational Activities by Employees of the Department

"Discussions between and among such employees con certain organizational activities, the solicitation of organizational support and the distribution of membership and authorization cards and organizational literature during nonworking hours and in nonworking areas, such as lounges, restaurants and cafeterias, are permissible. Such activities shall not impair the safe and efficient conduct of the operation, nor shall they interfere with work duties or work performance."

DETERMINATION AND ORDER

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

DETERMINED, that a demand for paid release time to conduct labor management relations activities which significantly and materially affect the collective bargaining relationship is a mandatory subject of bargaining; and it is hereby

ORDERED, that the petition of the City be, and the same hereby is, dismissed.

DATED: New York, N.Y.
July 29, 1975.

ARVID ANDERSON
C h a i r m a n

VINCENT D. McDONNELL
M e m b e r

EDWARD F. GRAY
M e m b e r

THOMAS J. HELIHY
M e m b e r

JOSEPH J. SOLAR
M e m b e r

N.B. See concurring opinion of Board Member Thomas J. Herlihy on following page.

Separate Concurring Opinion
Of Board Member Thomas J. Herlihy

In concurring with the decision, I wish to note that a factor considered in reaching the decision was the absence of an agency shop in the public sector, with a consequent lack of assured income with which the union can employ paid staff to perform representation services.

While I believe that the determination and order as herein written is a valid conclusion under existing circumstances, a reexamination of the decision is warranted if an agency shop should be established.

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