

DC37 v McIver (Dir. of Labor Relations), 29 OCB 22 (BCB 1982) [Decision No. B-22-82]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of
DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

DECISION NO. B-22-82

as List Representative

DOCKET NO. BCB-596-82

-and-

BRUCE McIVER, DIRECTOR OF LABOR
RELATIONS, as List Administrator

Pursuant to Administrative Code Section
B3-36.61.

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DETERMINATION

Since April 14, 1981 when a letter signed by Alan R. Viani, Director of Research and Negotiations, was sent to the Office of Municipal Labor Relations (OMLR), District Council 37, AFSCME, AFL-CIO (the Union) has sought to have the title Assistant Highway Repairer (AHR) added to the list of physically taxing positions provided for in Section B3-36.6 1. of the Administrative Code.

When several months of correspondence between the parties produced no mutually satisfactory result, the Union, by letter dated October 6, 1981 addressed to Arvid Anderson as Chairman of the Board requested that pursuant to Administrative Code Section B3-36.6 1.(7)(b) the Board make a finding whether the AHR title should be added to the list of physically taxing positions (the list).

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By letter of January 11, 1982, the Board rejected the argument offered by OMLR, that because issues as to additions to the list had allegedly been resolved in the past through collective bargaining between the parties, collective bargaining would be the appropriate - in fact the only - means of resolving the instant dispute were it not for the fact that Section 470 of the Retirement and Social Security Law bars bargaining on public employee pension matters.

We stated in our letter of January 11, 1982 that extra-statutory procedures and standards utilized by the parties could not have the effect of vitiating the statutory provisions or of relieving the Board of its duty under the provisions of Section B3-36.6 1. to adjudicate issues as to additions to the list. Accordingly, we advised the parties of our determination that the dispute between them was subject to the provisions of Section B3-36.6 1. and was a matter within our jurisdiction and directed that the parties "submit the issue ... to the precise steps prescribed by Section B3-36.6 1. That has been done; the Union requested addition of the AHR title to the list, the request was rejected, the Union objected by letter dated March 1, 1982 and Bruce McIver, as list administrator, responded by letter dated March 11, 1982, copy of which was sent to the OCB.

In the March 11 letter, OMLR reiterates its argument that, in the past, additions to the list have been treated as a subject of bargaining; as an extension of this argument OMLR adds the following contention:

Thus the titles included on the physically taxing list are included by agreement with the Union and not solely "by reason of their duties," and comparisons of the duties of AHR with the duties of other positions on the physically taxing list would not be dispositive.

The City also argues that the provisions of Section apply only to career pension plan positions and employees appointed to the title AHR are not to be "career pension plan members".

The Union by letter dated March 19, 1982 denies that the matter of additions to the list has in the past been treated by the parties as a subject of collective bargaining. As to the City's argument regarding "career pension plan" coverage as a condition for applicability of Section B3-36.6, the Union points out that the definition of the term "career pension plan positions" as used in Section B3-36.6 is set forth in Section B3-1.9(35) which reads as follows:

any position, whether held heretofore or hereafter, the holding of which constituted or constitutes city-service.

We find that the Union's position on this point is valid. Section B3-36.6, in its plethora of subsections, subdivisions, subsections of subdivisions, subdivisions of subsections of subdivisions etc., provides for all sorts of benefits many if not most of which expressly apply only to persons who are "career pension plan members". Subsection 1. with which we are concerned here, however, relates to positions which are "career pension plan positions"; and, as the Union has shown, that term is defined by the statute as any position the holding of which constitutes city-service. Thus, Section B3-36.6 1. provides that any position the holding of which constitutes city-service and which requires heavy duty and extraordinary physical effort shall be added to the list of physically taxing positions. Where a question arises as to whether failure of the list administrator (the Director of Labor Relations) to add a particular position to the list was justified, the statute provides, further, that the Board of Collective Bargaining shall resolve the issue.

Accordingly we find that a factual question exists as to whether the Assistant Highway Repairer position

"require[s] heavy duty and extraordinary physical effort", and will direct that hearings be scheduled for purposes of receiving testimony and evidence on that issue.

DATED: New York, N.Y.
June 17, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER