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

DECISION NO. B-1-70

DISTRICT COUNCIL 37, AFSCME, AFL-CIO

-and-

DOCKET NO. BCB-56-69

THE CITY OF NEW YORK
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DECISION AND DETERMINATIONS

The Union's petition herein, filed December 18, 1969, alleges that the Office of Labor Relations of the City of New York has taken the position that ten (10) collective bargaining proposals made by the Union on behalf of the bargaining unit of Construction and Maintenance Supervisory Service are not within the scope of bargaining. Petitioner seeks a final determination by the Board as to whether these matters are within the scope of bargaining.

The City's answer to the petition alleges that only 9 of the 10 proposals are not within the scope of bargaining for this unit and seeks a decision of the Board of Collective Bargaining so declaring.

Upon consideration of all of the papers and proceedings herein, the Board renders the following decision:

THE ISSUES

Petitioner's proposals consist of 18 items, numbered 1 through 18. The City does not dispute bargainability on items 1, 2, 5, 6, 7, 12, 13, 14 and 18. Those proposals, therefore, are not before the Board except that some comment is appropriate regarding Item #5, which was listed in the petition as an item on which the City disputed bargainability.

The proposal as made by Petitioner is for a contribution to an "annuity" fund of $5.00 per day per employee. The City's position is that bargainability on this item is not disputed provided that the proposal does not refer to a pension plan modification, since it appears to refer to a fund similar to a supplemental welfare fund. Pensions, under §5a(5) of Executive Order 52 (1967), are negotiable only with the designated representative or representatives of a majority of the employees in the pension system involved.[1] We find no dispute as to the bargainability of Proposal #5, provided it does not refer to pension plan modification.

The remaining demands of Petitioner are challenged on two grounds, as follows:

a. Attempted abridgement of management rights reserved in Executive Order 52, §5c.
b. The subjects concern matters which must be uniform for all career and salary plan employees under Executive Order 52, §5a(2).

Petitioner's proposals will be reviewed in such groupings: First, as to claimed managerial prerogatives; second, as to claimed City-wide bargaining jurisdiction.

PROPOSALS NUMBERS 3, 15 AND 16

The proposals numbered as above refer to the following subject matters:

#3. Creation of a new Superintendent title and level of compensation.

#15. Ratio of District Foremen (Highway Maintenance) to Foremen (Highway Maintenance), to be 1 to 5.

#16. Provisional appointments to be made from among employees permanently in next lower title.

[1] City of New York and D.C. 37, Decision No. B-4-69.

In #3 and #15, the City's claim of non-bargainability is based on the allegation that each proposed contract provision abridges the management rights reserved to the City in Executive Order 52, §5c.

Clearly, the demands for a new Superintendent title (Proposal #3) and for a ratio of District Foremen to Foremen (Proposal #15) do invade the management function. Executive Order 52, §5c reserves to management the determination of "methods, means and personnel by which government operations are to be conducted."[2]

Proposal #16 is disputed by the City on the ground that Section 65 of the Civil Service Law requires that the Personnel Department of the City has the responsibility for certifying to the qualifications of provisional employees prior to appointment. It appears to us that this proposal, too, is within the reserved managerial right to "determine the standards of selection for employment."

As we stated in a previous decision:[3]

> "Management prerogatives, nevertheless, may constitute voluntary subjects of discussion. As a voluntary subject, however, discussions of a management decision are subject to the limitations mentioned above and may not be referred to an impasse panel except (1) on mutual consent of the parties, or (2) where a practical impact exists...."

Absent mutual consent or proof of unresolved impact, the subjects in Proposals 3, 15 and 16 are not within the scope of bargaining.

PROPOSALS NUMBERS 4, 8, 9, 10, 11 AND 17

The proposals numbered above refer to the following subject matters:

#4. Pay in cash, in addition to annual salary, for holidays including the day after Thanksgiving.

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[2]Executive Order 52 (1967), §5c.

[3] City of New York & Social Service Employees Union, Dec. #B-11-68.

#8, Premium pay for Saturdays, Sundays, and holidays.
#9. Shift differentials.
#10. Pension plan changes.
#11. Time of payment for premium and differential pay.
#17. Interest payment on wage increases not paid within 60 days,

These or similar proposals dealing with the same subject matters were made in other cases decided by the Board of Collective Bargaining. We found them to be subjects which, under Executive Order 52, §5a, must be uniform for all career and salary or pension system employees and thus bargainable only on a City-wide basis.[4]

Petitioner does not dispute the applicability of §5a, but relies on a provision in §5a(2) which permits any certified representative of Career and Salary Plan employees to negotiate for a variation where "considerations special and unique to a particular department, class of employees or collective bargaining unit are involved." The special and unique circumstances alleged by Petitioner are that "almost all of the employees supervised by the employees in the unit receive some or all of the benefits contained in the disputed demands." (Underscoring supplied)

Section 5a(5) of the Executive Order, which relates to pension matters, contains no similar provision or exception. Item 10, above, therefore, clearly is not within the scope of bargaining herein.

As to the remaining items, the employees represented by Petitioner herein supervise both employees in the Career and Salary Plan and "prevailing rate employees" whose wages and "supplements" are determined by the City Comptroller pursuant

[4]City of New York & S.S.E.U., Decision No. B-11-68; City of New York & D.C. 37, Decision No. B-4-69.

to Section 220 of the New York State Labor Law. Matters so determined by the Comptroller are not within the scope of collective bargaining [NYCCBL, §1173-4.0a; Executive Order 52 (1967), §5a(2)].

Employees subject to Section 220 are paid the wages and supplements "prevailing in the same trade or occupation" (Subd. 3). As a matter of law, therefore, there necessarily are variations between the wages and benefits received by prevailing rate employees in the various trades, crafts and occupations, Career and Salary Plan employees, on the other hand, are subject to §5a(2) of Executive Order 52 (1967), which requires City-wide bargaining on those matters which must be uniform throughout the Career and Salary Plan.

The fact that the supervisory employees represented by the Petitioner herein supervise prevailing rate employees, among others, is not a special or unique circumstance, and cannot change the characteristics cf their own employment or enlarge the permissible scope of collective bargaining. They, themselves, are not prevailing rate employees.

DECISION AND DETERMINATION

Petitioner s proposals 3. 4, 8, 9, 10, 11, 15, 16, and 17 are not within the scope of bargaining herein; and

Insofar as Petitioner's proposal 5 does not refer to or involve pension plan modification, it is within the scope of collective bargaining.

DATED: New York, N.Y.
February 26, 1970.

ARVID ANDERSON
C h a i r m a n

Walter L. Eisenberg
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

EARL SHEPARD
M e m b e r

EDWARD SILVER
M e m b e r