DC 37 v. City, 7 OCB 16 (BCB 1971) [Decision No. B-16-71 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

DECISION NO. B-16-71

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO

DOCKET NO. BCB-78-70

-and-

OFFICE OF LABOR RELATIONS
THE CITY OF NEW YORK

A P P E A R A N C E S :

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DECISION, DETERMINATION, AND CONCLUSIONS

Based upon a provision of the City-wide agreement (Article XVII), dated November 4, 1970, District Council 37. (the "Union"), by letter dated November 13, 1970, requested this Board to determine, pursuant to §1173-5.0 of the New York City Collective Bargaining Law and §7.3 of the Consolidated Rules of the Office of Collective Bargaining, whether certain specified matters are within the scope of collective bargaining.

Article XVII of the City-wide agreement reads as follows:

"ARTICLE XVII - REFERRAL ITEMS [1]

> The parties agree that the following items submitted by the union shall be referred to the Office of Collective Bargaining for a determination as to whether they fall within the scope of collective bargaining:
>
> a. In all instances where department promotion lists have been established the City shall establish Administration wide and City-wide promotion lists. No employee shall be denied the right to take a promotion examination solely because of the absence of vacancies in his agency.
>
> b. The City shall make [Welfare Fund] contributions for all present and future retired employees, so that benefits can be continued during retirement.
>
> If the Office of Collective Bargaining determines that any of these items fall within the scope of collective bargaining, they shall be considered open items."

I

Analysis of the respective contentions of the parties, expressed in oral argument and in briefs, indicates that the Union seeks to use Administration-wide and City-wide promotion lists to supplement departmental lists in filling vacancies by promotion.

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[1] With respect to item 'b,' the parties have agreed to hold in abeyance further presentation of the issue to the Board pending the outcome of the Pittsburgh Plate Glass case now being considered by the U.S. Supreme Court. In this further connection, New York City Civil Service Retired Employees Association has requested and was granted permission by the Board to appear as amicus curiae in the matter involving the issue presented by item 'b.' The Association is not involved in item 'a' of Article XVII -- the subject of the instant issue.

The City interposes two basic objections; namely, that the Union's demand is a prohibited subject of collective bargaining barred by §5c of Executive Order No. 52 (1967) or because it involves either a Constitutional and statutory proscription which the parties cannot vary by agreement; or, alternatively, that the Union's demand is only a permissive subject of bargaining subject to §5c of Mayoral Executive Order No. 52.

Thus, the questions we perceive as applicable are as follows:

1. Under the Constitution or Civil Service Law is the City prohibited from bargaining with respect to the Union's demand?

2. If the answer to question "1" is in the negative, is the Union's demand a mandatory or voluntary (permissive) subject of bargaining under §5 of Executive Order No. 52?

3. If the Union's demand does involve a voluntary (or permissive) subject of bargaining, to what extent, if any, is the practical impact provision of §5c, Executive Order No. 52, applicable?

Both sides rely on §52 of the Civil Service Law as dispositive of the issue, the City citing subdivision 1 and the Union subdivision 4 in support of their respective positions. Since both subdivisions are part of the same statutory section, all parts of the statute are in pari materia, to be read together (McKinney's Statutes, §97), and both subdivisions "must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute." (McKinney's Statutes, §98)

Subdivisions 1 and 4 of §52 of the Civil Service Law read as follows:

"§52. Promotion examinations

1. Filling vacancies by promotion. Except as provided in section fifty-one, vacancies in positions in the competitive class shall be filled, as far as practicable, by promotion from among persons holding competitive class positions in a lower grade in the department in which the vacancy exists, provided that such lower grade positions are in direct line of promotion, as determined by the state civil ser vice department or municipal commission; except that where the state civil service department or a municipal commission determines that it is impracticable or against the public interest to limit eligibility for promotion to persons holding lower grade positions in direct line of promotion, such department or commission may extend eligibility for promotion to persons holding competitive class positions in lower grades which the department or commission determines to be in related or collateral lines of promotion, or in any comparable positions in any other unit or units of governmental service and may prescribe minimum training and experience qualifications for eligibility for such promotion.

* * *

4. Departmental and interdepartmental promotion lists. The state civil ser vice department and municipal commisions may establish interdepartmental promotion lists which shall not be certified to a department until after the promotion eligible list for that depart ment has been exhausted."

Section 52, Civil Service Law, including the cited subdivisions, have previously been construed by the courts. (Lorelli v. Manhattan & Bronx Surface Transportation Operating Authority, 266 N.Y.S. 2d 23).

In the Lorelli case, a group of Transit Authority employees sought assorted relief compelling appointments to vacant positions within Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) from civil service promotional lists. In dismissing the employees' petition, the court construed subdivisions 1 and 4 of §52, Civil Service Law, and stated:

> "Militating also against petitions' position is the oft-stated rule that the Civil Service Commission has the right and in appropriate circumstances the obligation to limit promotional opportunities to particular department's and units (Civil Service Law, section 52 subdivisions 1 and 4 Matter of Weizberger v. Watson, 305 N.Y. 507, 513, 114 N.E. 2d 15, 17; Matter of Cornehl v. Kern, 260 App. Div 35, p. 38, 20 N.Y.S. 2d 368,-p, 371, aff'd 285 N.Y. 777, 34 N.E. 2d 918). Granting arguendo the need for Civil Service intervention and examination here, there is every likelihood that it would and could have been restricted to the employees of MABSTOA alone."

(Emphasis ours)

If the Lorelli case is read as positive authority to limit promotional opportunities to particular departments, no less positive is the fact that the Commission possesses statutory discretion to hold "so-called city-wide promotion examinations, in which employees in the various offices of the City of New York have been permitted to take part" (Cornehl v. Kern, 260 App. Div. 35, 20 N.Y.S. 2d 368, 370).

However, as indicated in the Lorelli case, supra, it is the "declared policy of the State concerning Civil Service appointments, that promotions must be made from among those in the various departments where the vacancies exist" and that as "vacancies occur certifications are made from departmental lists first, and, when these lists are exhausted, certifications are then made from the citywide promotion lists" (Cornehl v. Kern, supra) (Emphasis ours).

Section 51 of the Civil Service Law, cited in the amicus brief as also applicable, provides, in part, that the Commission "on its own initiative * * * may determine to conduct an open competitive examination for filling a vacancy * * * instead of a promotion examination" (subd. 1) and, further, the Commission is also authorized "to conduct an open competitive and a promotion examination simultaneously" (subd. 2). Thus, vacancies are to be filled by promotions from among persons holding positions in lower" grades in the department and, for this purpose, the exhaustion of a departmental list is required. In all other respects the Commission is endowed with wide latitude with respect to the kind of examination it may hold; that is, a promotional examination, a City-wide promotional examination, an open competitive examination or even an open competitive and a promotion examination simultaneously. (Cf. Martin v. Conway, 199 Misc. 451, 106 N.Y.S. 2d 341, where the court confirmed the authority and discretion of the Commission to hold a promotional or an open competitive examination: "Two legally available methods of examination were open to the Commission.")

The fact that there is this latitude, "legally available methods," to hold different types of examinations, though promotions to vacant positions are governed by a statutory system which gives priority to departmental personnel, supports the conclusion that the Commission may exercise its option to hold examinations by voluntarily bargaining within the statutory guidelines concerning the type of examination to be held subject to the Civil Service Rules and Regulations.

We find that the Union's demand is within the statutory discretion of Sections 51 and 52 of the Civil Service Law with respect to holding promotional examinations.

We, therefore, conclude that the Union's demand does not involve a prohibited subject of bargaining.

II

We next consider whether the Union's demand is a mandatory or voluntary (permissive) subject of bargaining.
In this connection, the Board holds that in the absence of a prohibition forbidding the Commission to hold City-wide promotion examinations and the establishment of City-wide promotion lists, the Board has authority to determine the scope of bargaining in the instant case. The Board has rendered prior decisions concerning whether a particular union demand was within the scope of bargaining and whether a given matter is a mandatory or a voluntary (permissive) subject of bargaining (Matter of D.C. 37 and City of New York [Elevator Operators], Decision No. B-3-69; Matter of City of New York and SSEU, Decision No. B-11-68)

In the cited decisions we interpreted §5 of Executive Order No. 52 and delineated the areas of

bargaining as being mandatory, voluntary (permissive) or prohibited. We said that any demand relating to wages, hours and working conditions was a mandatory subject of bargaining, qualified only by the management prerogative clause Mc) whose various specified areas were reserved exclusively for management decision and, therefore, subject solely to voluntary or permissive bargaining. A further qualification involved the existence of a "practical impact" of the City's decision, the subject matter of which would then become a mandatory subject of bargaining. (Matter of City of New York and UFA and UFOA, Decision No. B-9-68)

Consistent with the general principle stated in those decisions, we hold that the Union's demand in the instant matter is in conflict with the rights reserved to management in §5c of Executive Order No. 52 to "determine the standards of selection for employment" and to "determine the methods, means and personnel by which government operations are to be conducted."

The rules and regulations of the Civil Service Commission concerning the conduct of examinations for selection and promotion of personnel are specifically applicable to mayoral agencies (Rule II - Applicability and Administration, Civil Service Rules and Regulations). We construe the specific phrases quoted above, reserving to the City the right to "determine the standards of selection for employment" and to "determine the methods, means and personnel by which government operations are to be conducted," to mean that civil service standards and procedures for examinations are the methods and means which the City must use to select personnel for appointment and promotion.

Consequently, we determine that the City's recommendation for the adoption of such civil service requirements for examination, including promotion, are an exercise of its prerogative under §5c of Executive Order No. 52. Therefore, the Union's demand is a voluntary (permissive) and not a mandatory subject of bargaining.

Our holding that the demand falls within the voluntary (permissive) area of bargaining means that the City is not obliged to bargain or negotiate with respect to such demand; it need only do so voluntarily, and if the City agrees to bargain and an impasse is reached, mutual consent is required before such issue may be submitted to an impasse panel (Decision B-4-69). It should be noted that the outcome of an agreement, if any, between the parties may only result in a request by the City to the Commission to implement the agreement. Should the matter go to an impasse panel, the NYCCBL and Executive Order provide that an impasse panel shall not by its recommendation require the City to support such request. (See §1173-7.0c(3)(b) NYCCBL and §5b of Executive Order No. 52)

The limitations cited in the NYCCBL and in the Executive Order are an apparent recognition of the statutory authority of the City Civil Service Commission to issue certain rules and regulations, inter alia, with respect to examinations. The Commission's authority finds support in decisional case law:

> "The Municipal Civil Service Commission is not the agent of the City of New York when it conducts examinations or investigates candidates."
> (Emphasis ours)

(Restaino v. City of New York, 185 Misc. 1027, 60 N.Y.S. 2d 617)

Prior Board decisions (B-3-69 and B-4-69) were cited at the oral argument and in the briefs of the parties in support of their respect positions. Both cases involved specific questions dealing with, in the one instance, the creation of new titles (B-3-69), and, in the other case, the determination of the eligibility of employees in one title to take examinations for other titles (B-4-69).

In the Matter of D.C. 37 and The City of New York (Elevator Operators) Decision No. B-3-69, we held that a demand for the creation of additional Elevator Starter positions or for the establishment of a new title of Senior Elevator Operator, invaded the area of management prerogative created by §5c of Executive Order No. 52, and we declared that the matter was not a mandatory but a voluntary subject of bargaining, specifically cautioning that we were deciding only the narrow question in that case. In B-3-69, we specifically stated:

> ". . . the determination herein does not mean that all questions concerning promotions are merely voluntary subjects of bargaining. Such other questions will be reserved for future determinations."

In the Matter of D.C. 37 and The City of New York (Motor Vehicle Operators) Decision No. B-4-69, the union demanded that Motor Vehicle Operators be eligible to take examinations for certain promotional titles. We held that the matter was within the scope of bargaining, recognizing, however, that the only action which could be taken by the impasse panel in that case would have been a recommendation to the Civil Service Commission.

The determination in that case, that the matter was within the scope of bargaining, was limited to the sole defense raised by the City in that case; namely, that the matter was "not bargainable advisory only to Personnel Department." That decision was thus addressed only to the question of whether a matter requiring implementation by a body or official other than the Mayor or the head of a mayoral agency was within the scope of bargaining. That being the only question presented, we did not decide, much less reach, the question of whether the union's bargaining demand in that case was a permissive subject of bargaining limited by §5c of Executive order No. 52.

To the extent that any other implications are read into our decisions B-3-69 and B-4-69, with respect to promotions, the same are dispelled.

III

At the hearing before the Board in the instant matter, the City and the Union discussed generally the question of practical impact with respect to the Union's demand. Since the record is insufficient on this issue, we make no finding on the matter.

DETERMINATION AND CONCLUSIONS

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 Constitution and Civil Service Law does not constitute a bar to negotiation and bargaining as is contemplated by the Union's demand; that agreement by the parties upon that demand would not be in violation of law: and it is further

DETERMINED, that the Union's demand herein is in conflict with the rights reserved to the City in §5c of Executive Order No. 52 to: "determine the standards of selection for employment" and to "determine the methods, means and personnel by which government operations are to be conducted; and it is

CONCLUDED, that the Union's demand is neither a prohibited subject of bargaining nor a mandatory subject of bargaining, but, rather, that the Union's demand is a voluntary subject of bargaining which the parties may negotiate subject to the limitations set forth in this Decision; and it is further

CONCLUDED, that there is no basis for a finding on the matter of practical impact.

DATED: New York, N.Y.
September 27, 1971.

ARVID ANDERSON
C h a i r m a n

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