Ass'n of Bldg Insp. V. Housing & Dev. Adm, 7 OCB 4 (BCB 1971) [Decision No. B-4-71 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Petition of
ASSOCIATION OF BUILDING INSPECTORS
-and-
HOUSING AND DEVELOPMENT ADMINISTRATION

DECISION NO. B-4-71
DOCKET NO. BCB-68-70

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

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AFSCME, AFL-CIO,
Amicus Curiae

DECISION AND ORDER

The parties hereto having been unable to negotiate a collective bargaining agreement, an impasse panel was appointed pursuant to §1173-7.Oc of the-New York City Collective Bargaining Law (NYCCBL). During the hearing before the panel, a dispute arose as to whether certain of Petitioner's demands were within the scope of mandatory collective bargaining whether the panel had the power to take recommendation respecting such matters. The Union thereafter petitioned the Board pursuant to NYCCBL §1173-5.0a(2) for determination of these questions, issue was joined by the City's answer, and oral argument thereon was heard by the Board. Briefs were filed by the City and by District Council 37, as amicus curiae.

The demands, which are at issue herein, relate to:

I. The establishment of a three-step wage scale;
II. Correction of promotional inequities.:
III. Job security;
IV. Establishment of a training fund;
V. Pick and Bid.

I. Salary Structure

The Union seeks to submit to the impasse panel its demand to establish a minimum pay rate with additional fixed-amount "steps" for employees with one and two years in the title, and a maximum pay rate for employees with. three or more years of service therein.

The City contends that this proposal is not a mandatory subject of collective bargaining; that it would involve a change in the increment structure of the Career and salary plan, and, therefore, may not be submitted to the impasse panel, citing NYCCBL §1173-7.0c(3) (b).which provides:

> (b) The report of an impasse panel shall be confined to matters within the scope of collective bargaining. Unless the mayor agrees otherwise, an impasse panel shall make no report concerning the basic salar y and increment structure and pay plan rules of the city's career and salary plan."

The Union and the amicus curiae contend that these are wage demands negotiable un der the statute and §5a(1) of Executive Order 52.

Career and Salary Plan

The City's Career and Salary Plan (CSP) was established by the Board of Estimate in 1954, and is applicable to positions in the competitive, non-competitive and labor classes, but excluding prevailing rate employees, the uniformed services, ferry and marine employees, and .numerous other specified positions.

Paragraph V of the CSP establishes minimum pay rates for 32 grades with annual increments in specified amounts until the fifth step of a grade is reached, with a longevity increment to grade maximum for three additional years of service. Paragraph X provides that these increments "shall accrue mandatorily except in the case of employees who receive ratings below standard service ratings." Provisions also are made covering salaries or increases payable on appointment and promotion (¶VIII).[1]

The General Pay Plan Regulations (GPPR) adopted by the Board of Estimate in 1955, to implement the CSP, define "Increment credit date" as "a date, either January 1 Or July 1, as the case may be, marking off one year periods of not less than standard service for the purpose to determining entitlement to annual or longevity salary increments" (§1.1)

[1] The CSP also contains time and leave regulations, which under §5a(2) of Executive Order 52 are negotiable with a certified employee organization, or group or council of such organizations, designated by the Board of Certification as representing more than 50 per cent of all employees subject to the CSP.

The "Alternative Career and Salary Pay Plan"

The fixed minima, maxima and increments of the CSP manifestly were considered incompatible with collective bargaining, and on March 15, 1967, Mayor Lindsay issued Personnel Order 21/67. The accompanying notice to department heads stated:

> "It has become increasingly apparent that the Pay Plan Regulations and salary grade structure of the Career and Salary Plan-should be changed to permit effective collective bargaining.
>
> "I am therefore modifying the-Career and Salary Flan to provide for an alternative Career and Salary Pay Plan based on collective bargaining agreements."
>
> (emphasis added)

PO 21/67 is applicable "to career and salary plan employees as to whom an Implementing Personnel Order has been or shall be issued establishing a pay plan upon a basis other than the Paragraph V Salary Increment Scales and the General Pay Regulations" (¶III, emphasis added).[2]

An "Implementing Personnel Order" is defined as "The Personnel Order Implementing an agreement" (¶II-17), and "agreement" is defined as "the agreement between the City and the labor union, association or other employee organization duly certified as representing Career and Salary Plan employees in the classes of positions covered by said agreement" (¶II-8)

Paragraph II-9 defines "Terms of Settlement" as "The economic terms to be included in an agreement."

[2] The underlined phrase also appears in ¶II-1 and ¶IX-2.

The terms "maximum basic salary", it general, increase and "service increase" are defined as rates of compensation or salary increases "pursuant to" or "in accordance with an Implementing Personnel Order" (¶II subds. 12, 13, 14).

Other provisions, relating to salary payable on promotion or transfer, contain the phrase "or as otherwise authorized by the Implementing Personnel 0rder" (¶5-2, 4)

The "General Provisions" of ¶IX are of major importance. Subdivision 1 provides that the terms of an IPO shall supersede any inconsistent provision of P0 21/67. Subdivision 2, in substance, provides that the salary and increment structure of the CSP shall be inapplicable to employees covered by an IPO during the effective term of the IPO and thereafter. The salary Structure provided in the IPO is to be exclusive, but terminates with the expiration date of the IPO and thereafter no pay plan is applicable to said employees.

The foregoing analysis clearly establishes that the purpose and policy of PO 21/67 was to substitute collective bargaining for the unilaterally determined and fixed salary and increment structure set forth in Paragraph V of the CSP. An IPO, by definition, is the administrative embodiment of the economic terms of employment arrived at through collective bargaining. Under the express terms of PO 21/67, the IPO, and hence the agreement, may include maximum basic salaries, general and service increases and salaries and increases payable on promotion or transfer.

When an agreement is reached and embodied in an IPO, the salary and increment structure of the CSP, by express provision, is inapplicable, not only during the effective term of the IPO agreement, but thereafter. The contractual nature of the collectively bargained "alternative pay plan" is further evidenced by the express limitation of its effectiveness to the term of the IPO agreement, which, in view of the continued inapplicability of the CSP pay structure, manifestly contemplates and requires the negotiation*of new terms and conditions of employment.

As noted above, the term "service increase" is defined in ¶II-14 of PO 21/67 as "A salary increase, based on length of service, not below standard service, added to the salaries of incumbents employed in a class of positions in accordance with an Implementing Personnel order."[3] Again, as an IPO is the implementation of a collective bargaining agreement, it necessarily follows that service increases are proper and mandatory subjects for collective bargaining. In this connection, it should also be noted that §5a(1) of Executive Order 52 sets forth the City's obligation to bargain in good faith on "wages (including but not limited to wage rates ... Service increases manifestly are the correlative of the annual increments provided in the CSP salary schedules.[4] Both are based upon length of service. The difference is that the annual increments provided in the CSP are fixed by law and permanent, whereas service increase

[3] Certain limitations are included in the case of excessive absences.

[4] The dictionary definition of "increment" is an increase.

under PO 21/67, are to be determined by collective bargaining, are contractual in nature, and are effective only for the term of the agreement. Thus, unlike a continuing pay plan with a mandatory incremental structure, such as the Career and Salary General Pay Plan, a bargained schedule of increases, based on service, is a mandatory subject of bargaining.

Accordingly, we find and conclude that Petitioner's dem and for the establishment of a minimum pay rate, with increases for additional years of service in the grade, does not affect or concern the basic salary and increment structure of the CSP; that it is a mandatory subject for collective bargaining; and is a subject on which an impasse panel may report and make recommendation.

II. Promotional Inequities

Petitioner seeks to eliminate certain alleged inequities in salaries which resulted from-past differences in the amounts of promotional increases. Petitioner and the amicus curiae urge that. this demand involves an economic matter and is a mandatory subject of collective bargaining.

The City contends that Petitioners demand would affect a change in the regulations promulgated in PO 21/67; that the demand involves a voluntary, rather than a mandatory subject of bargaining, which may not be submitted to an impasse panel without the City's consent; and that the demand is barred because the alleged inequities arose out of promotional increases which Petitioner had negotiated and accepted under the prior contract.

We find no merit in the contention that Petitioner's demand is barred by PO 21/67. Paragraph V-2 thereof provides that the salary payable on promotion shall be at certain rates "or as otherwise authorized by the Implementing Personnel Order." We have previously pointed out that an IPO is the administrative embodiment of the economic terms collectively negotiated; and, under IX-1, supersedes any inconsistent provision "of these Regulations."

Section.5a(1) of Executive Order 52, as we also have noted, recognizes the City's duty to bargain in good faith on "wages (including but not limited to wage rates, pensions, health and welfare benefits uniform allowances and shift premiums)." That promotional increases constitute wages and are customary and proper subjects for collective bargaining cannot be successfully disputed.

Nor do we agree that Petitioner's demand is barred by the promotional increases previously negotiated by it. The agreement was contractual, the effective period of the IPO agreement has expired, and under ¶IX-2 neither the provisions of the IPC "nor any other pay plan" nor applies to such employees.

Feinstein v. Procaccino, Sup. Ct., N.Y. Co., Sandifer, J., N.Y.L.J., 5/26/69, p. 17, cited by the City, clearly is distinguishable. There, an individual employee sought judicial correction of an alleged promotional inequity, contrary to the collective bargaining agreement negotiated by the certified union, The court held it was without power to grant the relief requested. Here, the agreement has expired, and it is the certified bargaining representative which is seeking to negotiate new contractual provisions.

We find and conclude, therefore, that petitioner's demand for correction of promotional inequities is a mandatory subject of bargaining and properly before the impasse panel.

III. Job Security

Petitioner's "Job security" proposal is twofold. It proposes: (1) that no permanent employee covered by the contract shall be laid off, demoted or lose his rank and title as a result of the reorganization of any City Department; and (2) that where new positions are established involving duties similar to those performed by employees covered, by the agreement, such employees "shall be given first priority through promotion transfer-change of title, or similar appropriate means,"

The City contends that these proposals impinge on reserved management rights and therefore may not be submitted to the impasse panel:

1. The "genesis" of Petitioner's request for a contractual ban on lay-offs "is the fear of wholesale transfers to a program . . . and, upon its termination, a lay-off . . . rather than a return to" their original department (Petition: ¶3).

Section 5c of the Executive Order 52 expressly reserves to the City the right to "relieve its employees from duty because of lack of work or for other legitimate reasons"; to "maintain the efficiency of governmental operations"; and to "exercise complete control and discretion over its organization and the technology of-performing its work." Petitioner's proposal manifestly invades the area of management rights. Moreover, the rights of competitive civil service employees under such circumstances are protected and governed by the Civil Service Law. Section 80 thereof provides that where competitive class employees are laid off (suspended or demoted) "because of economy, consolidation or abolition of functions, curtailment of activities or otherwise," lay-offs shall be in inverse order of seniority in

the department. Section 81 provides that employees who have been laid off shall be placed upon a "preferred list" and

> "shall be certified for filling a vacancy in any such position before certification is made from any other list, including a promotion eligible list, notwithstanding the fact that none of the persons on such preferred list was suspended from or demoted in the department or suspension and demotion unit in which such vacancy exists, No other name shall be certified from any other list for any such position until such preferred list is exhausted."

We find and conclude, therefore, that Petitioner's proposal for a contractual ban on lay-offs is not a mandatory subject of bargaining and, therefore, may not be submitted to, or considered by, the impasse panel (NYCCBL §1173-7.0c(3)(b); (Matter of City of New York and Social Service Employees Union, Decision No. B-11-68; Matter of City of New York and Uniformed Firefighters Assn. et ano, Decision. No. B-9-68).

Petitioner's proposal for a contractual ban on lay-offs manifestly invades the area of managerial rights is not a mandatory subject of bargaining, and therefore may not be submitted to, or considered by the impasse panel (NYCCBL, §1173-7.0c(3)(b); Matter of City of New York and Social Service Employees Union, Decision No. B-11-68).

2. The language of the second job-security proposal refers to priority of appointment to new positions in other titles. It presents different questions than the proposals hereinafter discussed concerning assignments to positions or duties within the same title.

Section 5c of Executive Order 52 reserves to the City the right to determine the standards of selection for employment; to maintain the efficiency of governmental operations; and to determine the methods, means and personnel by which governmental operations are to be conducted.

Certain sections of the Civil Service Law also are pertinent. Section 95 provides:

> "No officer or officers having the power of appointment or employment shall appoint or select any person for appointment, employment, promotion or reinstatement except in accordance with the provisions of this chapter and the rules and regulations established thereunder."

Competitive examinations are required wherever practicable (§550, 52) and selection must be made from the three persons standing highest on the list who are willing to accept such appointment or promotion (§61).

Section 70, subd. 1 prohibits transfers to a position for which there is required an examination involving essential tests or qualifications different from or higher than those required for the position held by the employee.

It is clear, therefore, that this proposal would invade the area of management rights; is not a mandatory subject of collective bargaining; and may not be considered by the impasse panel.

IV. Training Fund

Petitioner seeks a training fund to provide "tuition and released time" for Building Inspectors. The City contends that this impinges on reserved management rights is not a mandatory subject of bargaining; and may be submitted to the panel only on consent or proof of practical impact. Petitioner and the amicus curiae contend the proposal presents an "economic" issue and is a mandatory subject of bargaining.

Section 5c of Executive Order 52 reserves to the City the right "to maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; *** * *** and exercise complete control and discretion over . . . the technology of performing its work."

Establishment of a training fund or training procedures manifestly falls within the areas reserved to management. Petitioner's proposal, therefore, involves a voluntary or permissible, not a mandatory subject of collective bargaining.

As such, it may not be submitted to the impasse panel without the consent of the City or proof of a "practical impact" on the employees, not here claimed or established (NYCCBL §1173-7.0c(3)(b); Matter of Uniformed Firefighters Association, Decision No. B-9-68; Matter of Social Service Employees Union, Decision-No. B-11-68).

The voluntary-nature of the subject is not altered by the fact that training funds are provided in collective bargaining agreements with other unions, and that general provisions concerning such funds are contained in the City wide contract covering matters which must be Uniform for all Career and Salary employees. As stated in Decision No. B-11-68, supra: ". . . the fact that such agreement [on a voluntary subject) has been reached and included in a contract cannot transform a voluntary subject into a mandatory subject for the latter is fixed and determined by law.".

We find and determine, therefore, that the proposed training fund may not be submitted to the impasse panel for findings and recommendations,

V. "Pick and Bid" (Seniority)

The petition herein describes this proposal as one establishing "a seniority criteria for choosing areas to work in when openings*occur, for reorganization of the department, etc. In substance, it is a strict seniority provision for the purposes enumerated therein. As in "Job Security," this is a basic issue found in virtually every collective bargaining agreement in the land and one which is bargainable.

The City asserts that Petitioner's proposal would invade its reserved management rights and would "limit the City's mobility in rotating shifts, providing proper personnel at the proper time and with the proper qualifications" in an operation which "mandates a continuous rotating schedule rather than a fixed schedule of assignments."

In its memorandum to the impasse panel: Petitioner concedes that "In the final analysis a certain permanence of location and district would of necessity be accomplished."

In the private sector, seniority exists only by contract, and is a mandatory subject cf collective bargaining (Oneita Knitting Mills v, N.L.R.P., 375 F.2d 385, 64 LRRM 2724; N.L.R.B. v, I.A.M., 279-F.2d 761) In the public sector, seniority must be examined in different context, particularly where, as in New York, there is a constitutionally mandated civil service structure in which appointment and promotion must be based upon merit and fitness. Also pertinent are the management rights reserved in §5c of Executive Order 52.

Seniority is not an end in itself. It is a criterion the significance of which lies in the purposes for which it is used. The propriety of its use therefore turns on the nature of these purposes and necessitates consideration in the context of the applicable provisions of the Civil Service Law and the management rights reserved by the City.

Seniority provisions are contained in a number of secti9ons of the Civil Service Law. In promotional examinations "due weight" is to be given to seniority (§80.1)[5] Lay-offs are to be in inverse order of seniority (§80.1) with seniority

[5] Rule 5.3.23 of New York City Civil Service Commission gives seniority a weight of 15.

to be determined on a department basis unless the Civil Service Commission fixes a smaller unit (§80.3). On a transfer of function, employees must be transferred in order of seniority, with preferred lists for junior employees for whom no position's are available(§70).[6]

Manifestly, the uses of seniority as a criterion are subject to, and many not conflict with, existing law.

The uses of seniority also are affected and limited by §5c of Executive order 52,, which reserves to the City the rights, among others, to direct its employees; to maintain the efficiency of governmental operations; to determine the methods, means and personnel by which government operations are to be conducted; and to exercise complete control and discretion over the technology of performing its work.

Geographical rotation of the assignments of inspectors manifestly is within the City's reserved rights to determine the method and means by which government operations are to be conducted and to maintain the efficiency of governmental operations. The City's authority to rotate assignments, and the propriety and validity of its reasons for doing so, were upheld in Quinn v. Marcus. 28 A.D. 2d 834, 281 N.Y.S. 2d 370.

[6] Other provisions for preferred hiring or retention are contained in §§52.1, 81.1, 81.2, 85.7 and 86.

Petitioner's proposal, insofar as it seeks to Substitute a pick and bid seniority system-for the rotation of assignments deemed necessary by the City, therefore, s not a mandatory subject of collective bargaining and may not be submitted to the impasse panel for report and recommendations.

This conclusion, of course,, does not determine the negotiability of seniority as a criterion for other purposes not limited by law or the reserved rights. As was said in Erie County Water Authority v. N.Y.S.L.R.B. 4 A.D. 2d 545, affd., no opin., 5 N.Y.S. 2d 954:

> "[The] employees have received the benefit of civil service status and they must necessarily accept whatever curtailment such status causes in the scope of their bargaining rights. The fact that there may be some curtailment does not mean that whatever rights that may remain are not valuable."

The parties have not furnished details of the other aspects of the seniority and "pick and bid" proposals advanced by Petitioner, if any. Nor have we had the benefit of their respective arguments thereon. The foregoing

discussion and analysis, however, may clarify the scope of collective bargaining and eliminate other possible questions. rf issues remain, we will entertain a motion, by either Party, for 0 further determination.

Dated: New York, N.Y.
January 18, 1971.

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Board member Costello did not participate in so much of the decision herein as involves §1 relating to "Salary Structure."