Society of Urban Renewal Coor. V. City, 9 OCB 15 (BCB 1972) [Decision No. B-15-72 (Scope)]

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

NEW YORK CITY SOCIETY OF URBAN RENEWAL COORDINATORS — DECISION NO. B-15-72

-and — DOCKET NO. BCB-109-71

THE CITY OF NEW YORK
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DETERMINATION AND ORDER

The New York City Society of Urban Renewal Coordinators (hereinafter NYCSURC) filed a petition requesting a final determination as to the bargainability of four issues which arose in the course of its bargaining with the Office of Labor Relations of the City. As to two of the issues the City takes the view that they are mandatorily bargainable, while the Union contends they are not bargainable; as to the other two the Union maintains that they are the subject of mandatory bargaining, and the City maintains they are not.

BACKGROUND

Local 375, DC 37, AFSCME, originally represented the four Project Development Coordinator (hereinafter PDC) titles under two successive contracts, the first running from January 1, 1966, to June 30 1968, the second from July 1, 1968 to June 30, 1970.In January 1970

as the second contract was running out, NYCSURC filed timely petitions claiming to represent the employees in the four PDC titles (RU-161-70 for Senior PDC, RU-162-70 for three non-supervisory PDC titles). The City responded by filing a petition proposing to merge the PDC titles into a larger supervisory and non-supervisory unit comprising engineers and scientific and professional employees represented by DC 37. At the same time the Board was considering merging the PDCs in units sought by DC 37 in other cases.

As a result of these developments, certification of NYCSURC as bargaining representative of the two PDC units did not issue until June 23, 1971 (Dec. Nos. 50-71 and 51-71), almost a year after the contract with Local 375, DC 37, had expired, and a year-and-a-half after NYCSURC petitioned for certification.

On July 14, 1971 NYCSURC filed a bargaining notice requesting that negotiations begin for a contract to succeed the one which had expired June 30, 1970. Three bargaining sessions were held in August October and November 1971. During the course of these negotiations, on August 173, 1971, NYCSURC signed an election form opting to accept the uniform welfare contributions set forth in the second City-wide contract (Art. XIII, Sec. 1) and in Personnel Order 86/70.

On November 22, 1971 the Union filed the instant petition regarding the scope of bargaining issues which had developed in the course of the negotiations. Two days later it also filed requests that the impasse panel procedures of the New York City Collective

Bargaining Law be invoked for the two units for which it was certified (1-83-71, 1-84-71). The City opposed the Union's requests. On December 1, 1971 the Office of Collective Bargaining advised the Union that "because of the number and complexity of the issues" the Union's requests for the appointment of an impasse panel were being held in abeyance pending determination of the scope of bargaining questions.

Issue No. 1 - Effective Date and Retroactivity of Specific Contract Terms

In the course of the negotiations the Union demanded that the effective date of the new contract and specific terms of the new contract be retroactive to the day after the expiration date of the last contract covering the unit, i.e., July 1, 1970. The City maintained that both of these matters are bargainable.

Section 9 of Executive Order 52 (Effective Dates of Agreements and Retroactivity) provides as follows:

> "When a collective bargaining agreement covering a collective bargaining unit is concluded following the termination of a prior agreement covering the same unit, those provisions of the new agreement which by their nature can be made retroactive, and which the City has customarily made retroactive, shall be retroactive to the termination date of the prior agreement, providing that nothing herein contained shall prohibit the parties from agreeing, or an impasse panel from recommending that any benefit or other provision of a collective bargaining agreement be staggered or phased following the effective date thereof.
>
> When a collective bargaining agreement is concluded covering a unit as to which no collective bargaining

> agreement was in effect, the effective date or dates of the provisions thereof shall be the subject of negotiation."

The Union contends that the section mandates that successor contracts be made retroactive to the terminal date of the prior contract, and that the money terms be made retroactive since they have customarily been made retroactive in past agreements executed by the City. Hence, the Union argues, this subject is not within the scope of bargaining. It further cites the letter of City Director of Labor Relations, Herbert Haber, acknowledging receipt of NYCSURC's request for the commencement of bargaining, in which the "Effective Date" of the contract to be negotiated is said to be July 1, 1970. The Union argues that it has all along proceeded in timely manner as prescribed by law, that none of the delay in certification is attributable to it, and that Section 9 of E.O. 52 was intended to prevent such unavoidable gaps in collective bargaining representation.

The City's position is that "although the overall effective date of the new agreement being negotiated is July 1, 1970, the effective date of certain provisions of the agreement, such as wage increases and welfare fund contributions, is a proper subject for negotiations."

We cannot accept the Union's view that Section 9 creates a right on the part of the Union to insist that the terms of a successor contract shall be retroactive to the expiration date of the

contract. It is our view that the retroactivity of contract benefits and provisions is an appropriate and mandatory subject of bargaining. Bargaining as to wages, including how much shall be paid and when it shall be paid, is also mandatory. We see no reason for interpreting Section 9 as intending to reduce, limit, or in any way change the
absolute duty of both parties to bargain on wages. (NYCCBL Section 1173-4.3a).

Our conclusion is supported by the language of Section 9 which provides that adjustments may be staggered or phased by the parties, or that, in the event of an impasse, the impasse panel is authorized to recommend the staggering and phasing of benefits and provisions. In this case an impasse panel has been requested by the Union. If we were to uphold the Union's view of Section 9, such ruling would conflict with the express authority of an impasse panel to phase or stagger the introduction of specific benefits and provisions.

It is our view that Section 9 provides that where a collective bargaining agreement has been concluded, and the contractual provisions are silent as to their operative effect, there is a presumption that the parties intended to make those provisions retroactive which, in the words of the statute, can by their nature be made retroactive, and have customarily been made retroactive by the City. This interpretation, furthermore, is consonant with the general statutory design for the conduct of collective bargaining in the public sector, which encourages maximum bargaining while proscribing the right to strike, and favors continuity f the bargaining relationship in order to assure continuity in the delivery of

essential services by the City to its citizens.

The practical necessity for extended bargaining negotiations, sometimes involving impasse panel procedures, requires, as a matter of equity, that a successor renewal agreement should be capable of being made retroactive to the day following the expiration date of the prior agreement. For many years, however, the legality of payments of retroactive benefits was in doubt because of the provisions of Section 1, Article VIII, of the New York State Constitution which prohibits gifts and gratuities in public employment. In Timmerman v. City of New York, et al, 1946, 69 N.Y.S. 2d 102, aff'd 272 App. Div. 158, 70 N.Y.S. 2d 140, the courts found the NYC Transportation Board's grant of retroactive pay increases to its employees were nol "gifts" prohibited by the Constitution, but were supported by valid and legal consideration and hence did not violate the constitutional prohibition of grants of "extra compensation" to public officers, servants or agents by cities.[1] We hold that the language of Section 9 of E.O. 52 is likewise intended to serve a similar purpose, i.e., to authorize, validate or assure such retroactive adjustments.

Further support for the view that E.O. 52 contemplates and favors retroactivity and is intended to validate it but does not compel it in a successor contract is to be found in the regular practice of the City Personnel Director to issue Personnel Orders

[1] "Had the transit workers continued on their jobs after July 1, 1946, without any promise or assurance that any increases later decided upon would take effect as of July 1, 1946, the retroactive increases would be void as grants of extra compensation."

twice yearly in the middle and at the end of the year - extending the time limit for the completion of salary grade reallocations and/or other adjustments as a result of pending collective bargaining negotiations, recommendations of the Career and Salary Board of Appeals, or recommendations based on original jurisdiction. These Personnel Orders set forth that the settlements reached and the recommendations made in the extended time may be made retroactive

In short, we are of the opinion that although Section 9 of E.O. 52 declares that there shall be retroactivity under certain conditions and the Personnel Orders state that there may be retroactivity, the distinction is more a matter of semantics than real substance.

Issue No. 2 - Welfare Contributions

The Union contends that during the course of its negotiations with the City it made a valid election, pursuant to Art. XIII, Section 1, of the second City-wide contract and Personnel Order 86/70 to accept the uniform welfare contributions set forth therein. It asserts, therefore, that this matter is not an appropriate subject of bargaining. The City contends that the amount of the City's welfare fund contributions is a bargainable item because the Union's election of uniform welfare contributions was not timely, that is, was prematurely made.

The relevant provisions of Art. XIII (Welfare Funds) of the City-wide contract are as follows:

Article XIII

Section 1

Welfare contributions shall be made uniform for those mayoral agency employees subject to the Career and Salary Plan whose respective unions so select.

Under such election, and effective July 1, 1970, Welfare Fund contributions shall be permanently reserved for city-wide bargaining. This shall not, however, preclude the right of any certified union to bargain for Welfare Fund coverage for groups of employees not now included in Welfare Fund agreements. Welfare Fund contributions effective prior to December 31, 1970, shall be continued until December 31, 1970.

Section 2

a. For those employees who are covered by the District Council 37 Health and Security Plan (Welfare Fund) and whose certified union or unions elect the uniform contributions provided in this article, the City shall contribute a pro-rata annual sum of $175 per employee for remittance to such Welfare Fund subject to a separate agreement between the City and the Union. For those employees who are covered by any other welfare fund and whose certified Union elects the uniform contributions provided in this Article, the City shall make an equal contribution for remittance to such welfare fund subject to a separate agreement between the City and such Union. This paragraph shall become effective January 1, 1971.

b. Effective January 1, 1972, the aforementioned contribution shall be increased to $250 per employee per year.

The obvious purpose of Art. XIII, and P.O. 86/70 which implements the contractual provision, is to avoid a multiplicity of negotiations over welfare fund contributions with the many individual unions for whom welfare funds have been, or will be, negotiated, and

to make them) so far as possible, uniform as a result of bargaining with the City-wide representative.

On August 17, 1971, during the course of the negotiations with the City, and some two months after it was certified, NYCSURC signed a form entitled "Election by Certified Union of the Uniform Welfare Fund Contributions pursuant to Art. XIII of the 1970-73 City-wide contract." This form reads in relevant part as follows:

> "This election is made for the purpose of having the City act and rely on same, and of extending to the Union and the employees in the aforementioned bargaining unit all the benefits set forth in Article XIII. This election shall be permanent and irrevocable with respect to each of the aforementioned titles so long as the Union herein making the election is the exclusive certified bargaining representative of the employees in such titles."

The City contends that the Union could not elect the uniform welfare fund contributions of Art. XIII on August 17, 1971, because it did not then have a welfare fund of its own, and that a valid election could only be made after the signing of a separate agreement establishing such a welfare fund for it and detailing the benefits and coverage of the fund. The Union argues that the election is open to any certified union, whether it already has a welfare fund or is seeking one in negotiations.

When the unit employees in the four PDC titles were represented by D.C. 37 they were covered by the D.C. 37 Health

and Security Plan (Welfare Fund). After D.C. 37's contract expired on June 30, 1970, the City continued to make contributions to D.C. 37 until the latter was decertified and NYCSURC was certified on June 23, 1971. After June 23, 1971, the City remitted no contributions for the unit employees to any union. The Union's petition seeks to establish that its election of the uniform welfare fund contributions under Art. XIII of the City-wide contract and P.O. 86/70 removed the issue from bargaining, and that the payment of such welfare fund contributions shall be retroactive to the expiration date of the last contract covering the unit, that is, to July 1, 1970

We are persuaded that Section 1 of Art. XIII of the Citywide agreement created an open, standing, unrevoked, and non-discriminatory choice of a uniform welfare fund contribution to all certified unions, and that the right to make such choice was not restricted by time nor dependent upon the pre-existence of a welfare fund with the electing union. The City, being desirous of making the subject of welfare fund contributions a matter of city-wide bargaining with one union having city-wide bargaining status in order to avoid bargaining on welfare contributions with numerous individual unions, cannot now urge that a certified union may not elect the uniform contribution. Moreover, the unit employees herein were covered by D.C. 37's welfare fund, and they were represented by that Union until it was decertified by the unit employees and NYCSURC certified in its place. Thus the unit employees were in fact covered

by a welfare fund until they selected another union as their bargaining representative, although the new bargaining representative did not have a welfare fund at the time it made the election of uniform welfare fund contributions two months after its certification

NYCSURC seeks to have its election of uniform welfare fund contributions made retroactive to the expiration date of the prior contract. We find that its election was effective on August 17, 1971, the day it was made.

Issue No. 3 Lump Sum Money Payment in Lieu of Aborted Variable Annuity Option

In the negotiations the Union demanded a lump sum money payment for certain employees payable at one time, who would have been entitled to a variable annuity option under Section 13.6(e) of the City-wide Pension contract of 1967-70. This option was abrogated, the Union contends, as a consequence of the City's action in introducing in the State Legislature a repealer of the legislation authorizing such variable annuity benefits. The Union argues that the lump sum payment is the approximate money equivalent of the variable annuity benefits which unit employees would have chosen and enjoyed but for the City's action to void the provision of the City-wide contract. The City contends the demand is not bargainable by an individual union because it relates to retirement allowances which, like pensions, are reserved for City-wide bargaining with a union designated as representing a majority of employees in the pension system.

NYCSURC acknowledges in its petition "that a demand for increased pension benefits would not be a proper subject for these negotiations, "but contends that "the practical impact of the decision of the City to introduce the aforesaid legislation on employees, especially when reduced to a question of wages, is clearly bargainable under the provisions of Executive Order 52." Whether or not the City's action in initiating repealer legislation is an exercise of a management prerogative in the area of labor management relations, and whether a "practical impact" exists within the meaning of Section 5-c of Executive Order 52, are questions we need not answer here since we find the variable annuity option affect all Career and Salary employees under the pension contract, not mere the four PDC titles represented by the petitioning Union. Therefore it is our view that the subject matter, an alternative to the variable annuity option, is bargainable on a City-wide level affecting all Career and Salary employees.

We therefore decide that a money demand directly tied to pension benefits, or as an alternative benefit to pensions, is not bargainable by a representative having less than City-wide status for all Career and Salary employees.[2]

[2] When the State Legislature declined to implement the City-wide pension agreement in 1971 and 1972, D.C. 37, the City-wide representative, and the City thereupon, pursuant to the strike settlement agreement, began to bargain on alternative benefits for the unrealized contractual pension benefits. Such matter is now pending before the Impartial Members of the Office of Collective Bargaining.

Issue No.4. Demand for a Lump Sum Payment for Certain Employees

The Union demand is for a one-time, lump sum, money payment to certain employees over and above the general increase sought by the union for all current PDCs.

The City maintains that this demand is "a claim of a right of parity for certain unit employees with salary rates negotiated by the City for other City employees not represented by the petitioner," and that "parity with salaries paid to non-unit employees is not a mandatory subject of bargaining."

The Union contends that it seeks to obtain for PDCs specific sums equivalent to those granted to Methods Analyst titles on July 1, 1967, when the City voluntarily reopened its contract with the Methods Analysts to grant certain retroactive increases. The Methods Analyst contract was co-terminuous with the then-existing PDC contract (January 1, 1966 - June 30, 1968) and, the union alleges, contained wage terms "identical with those of the PDCs." According to the Union, neither the Method Analyst nor the PDC contract contained a wage re-opener provision, yet in the case of the former the City, in mid-term, granted unit employees an original jurisdiction increase (second Amendment to

P.O. 19/66-, Schedule A). NYCSURC contends that "Method Analysts and PI)Cs emanate from the same entry level examination, and have always received the same percentage salary increases at the same time." The Union denies ever having requested "parity" or having sought any clause formally pegging PDCs' wages or increases to those of Methods Analysts or any other title. The Union describes its demand as merely a catch-up wage provision for those PDCs employed on July 1, 1967 who did not receive a voluntary wage increase as did the Methods Analysts with whom the PDCs regard themselves as traditionally associated.

We do not regard the Union's demand herein to be one for "parity" such as was in issue in the Uniformed Fire Officers Association v. City of New York and Uniformed Firefighters Association v. City of New York (Decision NO. B-14-72). There the issue was the demand for "lock-step contract clauses which guaranteed pay parity and/or pay differentials" between titles represented by different unions. Here we find the instant union's demand to be based on "comparability bargaining," a mandatory subject of bargaining. As we stated in the Firefighters case, "the practice of comparability bargaining - reaching agreement on the wages

for one group in relation to another - has been traditional in bargaining between the City and its employees. The continuation of such comparability bargaining is contemplated by the standards outlined in the present statute." The merits, if any, of the Union's comparability demand is one for the parties to consider in bargaining, or for an impasse panel to determine.

* * *

The Board has before it the request for the appointment of two impasse panels for employees in supervisory and non-supervisory units. However, we believe that the parties should have an opportunity to attempt to resolve their contract dispute in the light of this determination prior to such appointment. If the parties are not able to resolve the contract within fifteen (15) days of the date of this determination, we shall, at the request of either of them, designate an impasse panel to resolve the open issues.

0 R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law to make final determinations as to scope of bargaining, it is hereby

ORDERED, that the matter of retroactivity of specific terms and conditions of a collective bargaining agreement, including wages, is a mandatory subject of bargaining; and it is further

ORDERED, that the petitioning union, having validly elected the uniform welfare fund contributions under Art. XIII of the City-wide contract (1970-1973) and Personnel Order 86/70, such contributions to the union welfare fund are effective August 17, 1971; and it is further

ORDERED, that the petitioning union's demand for a lump-sum money payment in lieu of the variable annuity fund option in the City-wide contract (1967-70) is a Citywide subject of bargaining and not a proper subject of bargaining by the petitioner, and it is further

ORDERED, that the union's demand for a lump-sum money payment to certain unit employees for increases comparable to those granted other city employees concerns wages and is an appropriate subject of bargaining, and it is

FURTHER DIRECTED, that, in accordance with the determination herein, the parties shall attempt to resolve

their contract dispute within fifteen (15) days of this determination and, thereafter, this Board shall, at the request of either party, designate an impasse panel to resolve any open issues which may, at that time, exist between them.

DATED: September, 1972
New York, N.Y.

Arvid Anderson
CHAIRMAN

Walter L. Eisenberg
MEMBER

Eric J. Schmertz
MEMBER

Morris Iushewitz for H.V.A.
MEMBER

John H. Mortimer
MEMBER

Edward Silver
MEMBER