DC 37 v. City, 9 OCB 21 (BCB 1972) [Decision No. B-21-72 (Scope)]

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

DISTRICT COUNCIL 37, AFSCME, AFL-CIO
-and-
OFFICE OF LABOR RELATIONS
THE CITY OF NEW YORK

DECISION NO. B-21-72

DOCKET NO. BCB-78-70

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

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DECISION AND ORDER

In our prior decision of September 27, 1971, we disposed of one part of the Union's request for a determination whether certain specified matters are within the scope of collective bargaining.[1] The other part of the Union's request for a determination involved the Union's

[1] Decision No. B-16-71 in which we determined and concluded that the Union's demand to negotiate the right of employees to take promotional examinations when vacancies exist in their department, and for the establishment of Citywide promotional lists where departmental lists were established, was permissive and not unlawful.

right to bargain on behalf of retired employees for contributions to a Health and Welfare Fund.[2] As explained in our prior decision, the issue involving the bargaining rights of retirees was held in abeyance pending the outcome of Allied Chemical & Alkali Workers v. Pittsburgh-Plate Glass Co.,404 U.S. 157, 78 LRRM 2974.

On December 8, 1971, the Supreme Court issued its decision concluding that retired employees are not "employees" appropriately includable in the collective bargaining unit, within the meaning of the NLRA which encompasses only "active" workers.

Our analysis of the Supreme Court's decision leads us to conclude that we should construe the NYCCBL in a manner that is consistent with the Supreme Court's rationale in the Pittsburgh Plate Glass case. We find and conclude that retired New York City employees are not "employees" within the meaning of §1173-3.0e of the NYCCBL since they are not "employed by municipal agencies whose salary is paid in whole or in part from the City treasury . . . ."[3]

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[2] The Union's demand was as follows: "b The City shall make (Welfare Fund] contributions for all present and future retired employees, so that benefits can be continued during retirement." See item b of "Article XVII - Referral Items," page 2, Decis. No. B-16-71.

[3] See also Chap. 52, General Provisions, Title A, Adm. Code, §1150-1.07 Definitions. "7. 'Employee.' Any person whose salary is paid in whole or in part out of the City Treasury."

The NYCCBL grants the right to bargain collectively solely to active employees and not retired employees. Therefore, only active employees are includable in a bargaining unit. Conversely, retired City employees cannot appropriately be included in a unit with active employees for collective bargaining purposes.[4]

Thus to the extent that we have indicated in our decision, our construction of the NYCCBL is compatible with the fundamental rationale in the Pittsburgh Plate Glass case and therefore determinative of the fundamental issue in the case before us.

O R D E R

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

[4] No question exists in this case concerning the statutory right of the Union to negotiate contributions to the Union Welfare Fund for active employees. To this extent the phrase "future retired employees" in the Union demand is synonymous with "active employees," i.e. those employees who are on the payroll and will some day in the future retire. This decision does not affect any rights of employees who on the effective date of a contract were active employees but who, since that date, have retired.

ORDERED, that the Union's request to bargain collectively with respect to contributions to a union health and welfare fund, on behalf of retired employees, be, and the same hereby is, dismissed.

DATED: New York, N.Y.
November 6, 1972.

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