SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 50P

Application of UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK

Petitioner,

For an Order and Judgment Pursuant to Article 78 of CPLR

Index No. 1065/90

-against-

THE NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, BOARD OF COLLECTIVE BARGAINING,

Respondent.

FRANKLIN R. WEISSBERG, J.

Petitioner Uniformed Firefighters Association of Greater New York (hereinafter "the UFA") is the certified collective bargaining representative of the Firefighters and Fire Marshals employed by the New York City Fire Department.

The Office of Collective Bargaining is a labor relations agency established pursuant to Chapter 54 of the New York City Charter. One of its components is the Board of Collective Bargaining ("BCB").

Petitioner commenced this proceeding pursuant to CPLR Article 78 seeking to annul a determination of BCB contained in a decision and order dated December 18, 1989 which decided that the plans of

the City of New York to reduce minimum manning levels in engine companies from five to four firefighters do not create a practical impact within the meaning of New York City Collective Bargaining Law (“CBL”), New York City Administrative Code §12-307(b). Petitioner claims the decision and order of BCB should be set aside as in excess of BCB's jurisdiction and because it is arbitrary and capricious and affected by errors of law.

Respondent BCB was established pursuant to Section 1171 of the New York City Charter and is vested with the power under Section 12-309(a)(2) of the CBL “to make a final determination as to whether a matter is within the scope of collective bargaining” as defined in section of the CBL.

In negotiations between the UFA and the City of New York ("the City") over a successor agreement to the parties’ 1984-87 collective bargaining agreement ("1984-87 agreement" the City sought to eliminate Article XXVI of the 1984-87 agreement. Article XXVI, entitled "Five-Man Manning," required, with certain specified exceptions, that "all companies ... are to be manned by no less that 5 employees at the beginning of each tour."

The parties' negotiations tailed to produce an agreement, and on August 22, 1988, the UFA filed with BCB a Request for the Appointment of an Impasse Panel. On September 6, 1988, BCB declared that negotiations between the UFA and the City over a successor to the 1984-87 agreement had reached an impasse.

Following BCB's declaration that an impasse had been reached, the City petitioned BCB tor a ruling that many provisions of the

1984-87 agreement, including Article XXVI, were not mandatory subjects of bargaining under section 12-307 of the CBL and therefore that the City could omit them, without bargaining, from a successor contract.

On February 24, 1989, BCB issued a scope of bargaining decision and order, Decision No. B-4-89. in which it ruled that the subject of minimum manning was non-mandatory. BCB's decision noted, however, that an inquiry would be necessary to determine the practical impact of any change by the City in minimum manning levels. BCB further indicated that if such an impact were shown to exist, the City will be directed to negotiate over its alleviation.

On June 6, 1989, BCB scheduled a hearing to determine whether the reduction of minimum manning levels in firefighting companies, from five-man to four-man crews, creates a practical impact on the safety and workload of firefighters. Thereafter detailed hearings were held before a Hearing Officer. After reviewing the transcript of those hearings BCB rendered the Unanimous decision which petitioner seeks to annul. That decision:

> "Determined, that the City's plans to reduce minimum manning in some engine companies from five-man to four-man crews, which we have considered together with its plans concerning roster manning, adaptive response, and engine company tactics, have not been shown to have a practical impact on employee safety or workload within the meaning of the statute. and are therefore. not matters as to which the City is obligated to engage in collective bargaining.

Petitioner argues that BCB exceeded its jurisdiction and acted in an arbitrary and capricious manner by considering the city's

roster manning plans as part of its determination that no practical impact resulted from the reduction of minimum manning levels in fire fighting companies from five man to four man crews. BCB accepted, over petitioner's objection, a communication addressed to its hearing officer we'll after the close of the hearing in this case. The submission concerned the City's future plans to deploy firefighters. Petitioner's contention is that once BCB had decided that reduced manning levels would have a practical impact it had no authority to do anything other than direct the parties to collectively bargain regarding the manner in which that practical impact should be alleviated and that therefore any consideration of the post-hearing submission was improper.

The difficulty with petitioner's argument is that it assumes that a determination of whether or not a practical impact exists can be made without examining the City's plans for future deployment of firefighters. However, such a determination cannot be made in a vacuum. It was necessary and appropriate for BCB to analyze and consider the City's future allocation of firefighting resources in assessing whether or not a practical impact would result from the roster manning changes. The record is clear that BCB considered that issue in depth during the hearings and that evidence was adduced by both parties with respect thereto.

The submission to which petitioner objects was therefore entirely appropriate. Although petitioner objected to that submission it was given an opportunity to and did in fact respond on the merits. Consideration of the submission was within BCB's

discretion and was done with fair regard for the interests of both sides. It is well settled that an Administrative Board is not required to comply with technical rules of procedure and evidence as long the fundamental requirements of a fair hearing are met. Matter of Sowa v. Looney, 23 NY2d 329 (1968); Matter of Rudner v Board of Regents of the New York State Department of Education, 105 AD2d 555 (3d Dept. 1984). Given the opportunity presented to petitioner to respond to the post-hearing submission it cannot be argued that the requirements of a fair hearing were violated.

Clearly BCB's decision was not frivolous. It was arrived at after both sides were given an opportunity to present evidence relating to all relevant issues. Since there is a rational basis for that decision, this court may not overturn it. West Irondequoit Teachers' Ass'n. v. Helsby, 35 N.Y.2d 46, 50, 358 N.Y.S.2D 720, 722 (1974).

It is also clear that BCB's determination that no practical impact exists was not based upon the supplemental submission. The concluding portion of BCB's decision states:

"The city's revised proposal confirms and reinforces (emphasis added) this Board's conclusion that the roster manning program and its constituent elements, including adaptive response and revised engine company tactics, are not demonstrably likely to magnify the dangers or the work burdens inherent in firefighting and, accordingly, may be made operative managerially rather than as a product of negotiation. The City's overtime guarantee, though unilaterally given, and the finite reduction in headcount are

regarded by this Board as elements of the record our judgment reflects. We wish to emphasize that our decision is based upon the configuration of elements described by the City and set forth in the record in this case and that we make no finding with respect to the practical impact that some other configuration of elements not presented here may or may not have on the safety or workload of firefighters in the future."

BCB's decision makes clear that no practical impact exists at present under the current plan. It makes equally clear that petitioner is not precluded from raising a "practical impact argument" in the future should the City's deployment of firefighting resources be significantly changed.

It should be noted that CBL Section 12-307(b) gives the City very broad management authority which is not within the scope of collective bargaining. That section provides:

> "It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; to determine the standards of selection for employment: direct its employees; take disciplinary act-ion, relieve its employees from duty because of lack of work or for other 'legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining. "

BCB's decision to consider, the post-hearing submission was not

arbitrary, capricious or unlawful given the statutory scheme under which respondent functions.

Petitioner also claims that the standard employed by BCB to determine that no practical impact existed herein was unprecedented in the burden it placed on the union. It argues that it was a departure from previous standards for BCB to impose a "heavy" burden on the union to establish that a management decision has presented an "extraordinary and substantial" adverse effect on working conditions or that a "patent" threat to safety existed.

There is no indication, however, that the determination which BCB reached herein was different from those reached in similar situations. Indeed, there is some question whether the adjectives to which petitioner objects represent any true change in standard. It is doubtful, for example, that the use of "patent" instead of clear" is of any legal significance.

Petitioner quite correctly states that an administrative body which fails to conform to a prior determination, without an explanation of the reasons therefor, acts in an arbitrary and capricious manner. Matter of Field Delivery Serv. [Roberts], 66 N.Y.2d 516, 520 (1985). This is true "irrespective of whether the record contains a rational basis or substantial evidence supporting the later determination." N.Y. Cable v. Public Serv. Comm., 125 AD2d 3 (3d Dept. 1987). However, nothing in the BCB determination herein represents a reversal of prior decisions. Any minor changes in wording involve no basic change in the meaning of the phrases used. Petitioner's contention to the contrary is rejected.

Respondent's claim that this matter should be transferred to the Appellate Division for decision is also rejected. Respondent relies on CPLR Sections 7803(4) and 7804(g) which authorize transfers to the Appellate Division of questions involving whether determinations of quasi Judicial hearings are supported by substantial evidence. Petitioner's complaint herein is not grounded on a lack of evidence before the BCB. It is based on allegations of arbitrary and capricious behavior and of actions unauthorized by law. Those allegations are clearly subject to review by this court. See CPLR Sections 7803(2) and (3) and 7804(g).

Respondent's motion to transfer this matter to the Appellate Division, First Department is denied. Petitioner's motion to set aside the determination of respondent (Decision No. (B-70-89) is also denied.

The foregoing constitutes the decision and order of the court.

DATED: NEW YORK, NEW YORK
NOVEMBER 26, 1990

FRANKLIN R. WEISSBERG
JUSTICE OF THE SUPREME COURT