SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 36
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THE CITY OF NEW YORK,

Plaintiff,

-against-

MALCOLM D. MacDONALD, as Chair of the New York City Board of Collective Bargaining, JAMES BOYLE, as President of the Uniformed Firefighters Association of Greater New York,

Respondents.

Index No. 45920/92

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MARTIN EVANS, J.

This is a proceeding, under CPLR Article 78, to annul and set aside an order of the New York City Board of Collective Bargaining (herein, BCB) on the ground that it is arbitrary, capricious, contrary to law and in excess of the jurisdiction of the BCB. The City of New York also seeks a declaration that Section 470 of the Retirement and Social Security Law, ("RSSL 470"), precludes a change in the pensionability of longevity payments under the circumstances of this case.

In 1968, the City and the Uniformed Firefighters Association of Greater New York (herein, "UFA") entered into their first collective bargaining agreement. This contract expired on September 30, 1970.

At that time, the UFA, to obtain more "take-home pay" for its members, bargained for increased pay based on longevity, and in

exchange for that, agreed to waive its rights to have this increased pay, based on longevity, considered as salary for pension purposes. Therefore, the contract so provided. This, of course, had the intended effect that the City was not required to pay greater amounts to the pension system.

The next collective bargaining agreement was dated June 1, 1971 and covered a period which ended on June 30, 1973. The pertinent provisions of the contract, which are now known as Article VI, Sec. 2 (c) (i) and (ii) , were continued.

In 1972, the obligation to bargain collectively both as to wages, which would include payments based on longevity and pensions was made mandatory by what is now known as, New York City Collective Bargaining Law, Section 12-307 (“NYCCBL”) or Title 12, Ch.3, Section 12-307 of the Administrative Code of the City of New York ("Admin. Code") That section was originally enacted as L.L. 1972, No. 1, January 12, 1972.

By 1973, as a result of collective bargaining over pensions, the costs of pensions for retirement benefits rose to such an extent that the legislature passed, and the governor approved, the passage of RSSL 470, effective May 1, 1973. To prevent increased pension costs, this section, prohibits:

> “... Until July first, nineteen hundred ninety-three changes negotiated... with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees or their beneficiaries..”

The Taylor Law, Civil Service Law Sec 201(4), (CSL 201(4).), was also amended, effective April, 1973, as part of the Governor's program "to halt the alarming rise in taxpayer costs for retirement benefits for public employees". 1973 McKinney's Session Laws, Vol. 2., Governor's Memorandum, Public Employees - Retirement Benefits Reform Program at p. 2343. CSL 201(4), provides in pertinent part:

"The term 'terms and conditions of employment' ...shall not include ... any benefits provided by or to be provided by a public retirement system..."

CSL 201(4), L. 1973, c. 382 §6, and RSSL 470, L. 1973, c. 382 §48 were both enacted as part of Assembly Bill 8071 to bring "under reasonable control" the "steeply mounting cost of public employee pensions . . ." See, Governor's Memorandum, supra. The Governor's Memorandum stated that under the provisions of the bill:

> [N]ew and significant limitations on public employee pensions, agreed to in collective negotiations between the State and Civil Service Employee's Association, are established.
>
> Also, the bill provides that pensions will no longer be a subject of negotiations within the-meaning of the Taylor Law . . .
>
> This is a good program. This is a responsible program. This a program which will save the taxpayers of the state millions of dollars each year . . . Id.

The legislature apparently amended CSL 201(4), L. 1973, c.382 §6, to be consistent with its mandate in RSSL 470, L. 1973, C.382 §48, that bargaining over changes in pension benefits were prohibited. The purpose of the enactment of RSSL 470 and the amendment to CSL 201(41 was to preserve whatever the existing agreement was with respect to pensions and to prevent any increases

not permitted by legislative act. Accord, Governor's Memorandum, supra. These statutes are currently in effect.

The legislature did not intend to prevent increased expense to the city in the nature of pension expense which would obviously result from bargained for increases in wages. The fact that wages remained a mandatory subject of bargaining pursuant to CSL 201(4) after that statute was amended and the enactment of RSSL 470, reflects this intention.

Implicit in the statement of the legislature's intention to prevent increased costs of public employees retirement benefits is the intention to encourage the reduction of those costs. Therefore, RSSL 470 does not prohibit changes in pension benefits which would result in decreased pension costs.

All successive bargaining agreements between the City and the UFA contained the same provision concerning the waiver of pensionability of the longevity payments that had been set forth in the first agreement. The last agreement, which covered the period from 1987 to 1990 expired on June 30, 1990.

Pursuant to NYCCBL 12-311 (d) , the terms of the last agreement have been continued, and will continue in effect, until a new agreement is reached.

Although pensions are a mandatory subject of bargaining pursuant to the NYCCBL 12-307 and thus subject to negotiation, this requirement has been suspended by RSSL 470 which was enacted more than a year after the enactment of NYCCBL 12-307.

Acting pursuant to NYCCBL 12-311, UFA and the City requested the BCB to appoint an impasse panel in 1992, after they were unable to reach a new agreement. Thereafter, UFA petitioned the BCB to

determine that the pensionability of longevity pay was not within the mandatory scope of bargaining.

The BCB has the duty to issue a declaratory ruling on whether a particular issue is within the scope of collective bargaining. See, NYCCBL 12-309a(2). The determination depends on whether the subject matter concerns wages, hours or working conditions. NYCCBL 12-307a. If the demand does not concern wages, hours or working conditions it is a nonmandatory subject of bargaining and may not be negotiated or submitted to an impasse panel except by the mutual consent of the public employer and the certified or designated employee organizations. See, NYCCBL 12-311(c). Demands, such as for increased pension benefits although otherwise within the scope of bargaining, nevertheless may be temporarily suspended by statute. See, RSSL 470; NYCCBL 12-307.

The BCB's determination with respect to whether a demand is within the scope of bargaining is important to the resolution of bargaining impasses. An impasse panel has the power to resolve the impasse by whatever means it deems necessary including the issuance of a written report and recommendations which effectively becomes the terms of settlement. See, NYCCBL 12-311(c) (3) (a). The impasse panel award can include only those items which are within the mandatory scope of collective bargaining and not those items which the BCB determines are not within the mandatory scope of bargaining. See, NYCCBL 12-311(c) (3) (c) Demands determined to be not within the mandatory scope of bargaining cannot be submitted to an impasse panel in the first instance.

The purpose of the UFA's application was to obtain a determination that the issue of pensionability of longevity pay was

not to be submitted to the impasse panel and prevent the provision limiting pensionability from being included in the successor agreement.

The BCB, by decision B-44-92, dated November 18, 1992, declared that the pensionability of longevity payments was not within the scope of bargaining and was a nonmandatory subject of bargaining. The BCB then went on to declare that these provisions may not be "carried over" into the successor agreement over the UFA's objection. BCB did not consider any effect of RSSL 470 in making its determination because it claimed that RSSL 470 is outside the statutory scheme which it administers.

The consequence of this determination is to extirpate the provision which limits pensionability of longevity pay from any successor collective bargaining agreement without the mutual consent of UFA and the City.

Since bargaining over pensions is mandatory, but is temporarily prohibited by statute, BCB's determination was error as a matter of law. The clear mandate of RSSL 470, a state statute, is pre-emptive on this issue. The strict words of RSSL 470 prohibit changes in pension benefits. Therefore, those provisions relating to the calculation of pension benefits which existed as of the effective date of RSSL 470 must be continued.

The BCB's determination, which went on to determine that the provisions may not be "carried over", would have the effect of extirpating Article VI, Sec. 2 (c) (i) and (ii) and amounts to the creation of a change which has not, as is required by RSSL 470, received the approval of the Legislature. It is, therefore, erroneous as a matter of law and must be set aside.

The BCB also declared that Article VI 2, (c) (i) and (ii) were severable from the remainder of Article VI, 2 of the Agreement and that Article VI, 2 contained elements which concerned a mandatory subject of bargaining, longevity pay. This was also an error.

The terms of Article VI, 2 constitute one, unified, bargain between the parties on the issue of longevity pay. Therefore, its provisions must stand or fall together. The give and take inherent in the bargaining process resulted in the City's agreement to a larger amount of longevity pay in exchange for the UFA's agreement to accept less pension benefit that would be based on longevity pay. The BCB's determination, which effectively compelled the City to honor the agreement with respect to the amount of longevity pay while allowing the UFA to avoid its quid pro quo, ignored the plain intention of the parties at the time the bargain was made, the realities of the bargaining process and would unjustly allow the UFA to reap a windfall. This was illogical, without a rational basis and therefore arbitrary and capricious. That aspect of the BCB's determination is also set aside.

Settle order and judgment.

June 23, 1993

J.S.C

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