SUPREME COURT : NEW YORK COURT
SPECIAL TERM : PART I

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SAMUEL DE MILIA, President of the Patrolmen's Benevolent Association of the City of New York and all other Police Officers of the City of New York similarly situated,

Plaintiffs,

INDEX #9683/78

-against-

The State of New York, LOUIS LEFKOWITZ, Attorney General, HUGH CAREY, Governor of the State of New York, MAYOR EDWARD KOCH, on behalf of the City of New York, CHAIRMAN ARVID ANDERSON, on behalf of the Office of Collective Bargaining,

Defendants.

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GABEL, J. :

Motions 15 and 16 of September 19, 1976 are consolidated for disposition.

In this matter, the Court is called upon to determine whether Chapter 201 of the Laws of 1978 including Section 23.3(a-h) is unconstitutional on several grounds alleged by plaintiff (PBA). Chapter 201 amends the New York State Financial Emergency Act for the City of New York (Chapter 865, Laws of 1-975; FEA).

Section 23.3 (a-h) imposes a new limitation on the bargaining and arbitration provisions of the New York City Collective Bargaining Law (Chapter 54, Administrative Code 1173-71.0[c]) based on the City's ability to pay wage increases and other benefits.

The Court must also determine whether §23.3 (a-h), by allegedly removing "arbitration as an available tool" (Petition, paragraph 17), has eliminated the ban on public employee strikes contained in the Taylor Law (Civil Service Law §209,.209A, 210)*.

Chapter 201 and the Legislative Findings

The FEA was enacted in 1975 and is predicated on legislative findings that a financial emergency existed in The City and that the emergency constituted a clear and present danger to the health, safety and welfare of its inhabitants.

* The matter is before the Court by way of a motion by plaintiff for an injunction and an order in the nature of a declaratory judgment. The defendants move to dismiss on the ground that plaintiff fails to state a cause of action and for an order declaring the legislation to be constitutional.
Although plaintiff's motion is supported by what is denoted as a petition, the Court treats the matter as an action for a declaratory judgment (CPLR 103(c) there being no objection to personal jurisdiction raised by any of the parties.

FEA provided for the creation of an Emergency Finance Control Board to review, control and supervise the financial management of the City. Other provisions regulated the investment. of funds by pension and retirement systems for public employees and imposed a wage freeze on City employees. FEA's constitutionality has been sustained.

In Chapter 201, the Legislature found that the financial emergency continued to exist in the City (§l.a) and that “It is a matter of substantial and imperative state concern that the City not fail to meet its obligations...”. Chapter 201, continued and supplemented the provisions of FEA in order to obtain federal guarantees of City obligations and return the City to fiscal responsibility. The measure, inter alia, repealed the wage freeze (§35).

Existence of the facts found by the Legislature is presumed, although subject to rebuttal (United States v. Carolene Products Co., 304 U.S. 144, 152, Lincoln Building Associates v. Barr, 1 N Y 2d 413, 415). And these legislative findings as to a “public emergency” are entitled to “great weight” (East New York Savings Bank v. Hahn, 293 N Y 622, 627, aff’d 326 U.S. 230; see Block v. Hirsh, 256 U.S. 135, 154-155.)

Preliminarily, this Court finds that Chapter 201 is in consonance with the police powers bf the State. (Wein v. Beame, 43 N Y 2d 326, 331 (1978); Public Interest v. Steingut,

40 N Y 2d 250 257 (1976) ; Montgomery v. Daniels, 38 N Y 2d 41, 54 (1975).]

Provisions of §23.3(a-h)

Section 23.3 (a-h) enacts new subdivisions 3 through 6 of Section 7 of the FEA. Basically, it provides that any report or recommendation of an impasse panel established pursuant to the New York City Collective Bargaining Law (Admin. Code §1173.07.0[c]) or finding of the Collective Bargaining Board which provides for increases in wages or fringe benefits to City employees must, in addition to other specified criteria, "consider and give substantial weight" to the City's "financial ability to pay" such increases. "Financial ability to pay" is defined as "the financial ability of the City....to pay the cost of any increase ... without requiring an increase in the level of City taxes existing at the time of the. commencement" of impasse proceedings under §23.3 a,c and d. Section 23.3(a-h) is concerned, of course, with all City taxes and is not limited to real estate taxes (emphasis added).

The Restriction on Tax Increases

The plaintiff PBA argues that §23.3(a-h) violates Article VIII, Section 10 of the State Constitution which states that the City shall not tax real estate in any fiscal year in an amount exceeding 2 1/2% of the average full valuation of taxable

real estate of the City.

Thus, according to the plaintiff if at the time that impasse proceedings were initiated, the City was taxing real estate at less than 2-1/2%, §23.3(a-h) would preclude the City from "asserting its constitutionally. guaranteed prerogative to tax up to 2.5% (plaintiff's memorandum at p. 7) in order to provide increases.

There is no merit to plaintiff's argument. It ignores the clear language in the last paragraph of Article VIII Section 10 of the Constitution which states:

> "Nothing contained in this section shall be deemed to restrict the powers granted to the legislature by other provisions of this constitution to further restrict the powers of any county, city, town, village or school district to levy taxes of real estate." (emphasis added).

This language, coupled with the absence of any restriction upon the power of the Legislature to fix a lower limit of permissible taxation. (other than a limitation relating to debt service), empowered the Legislature to enact Section 23.3(a-h).

FEA is also valid under Article VIII, Section 12 of the New York State Constitution which provides that "it is the duty of the Legislature to restrict the power of taxation, assessment, borrowing money, contracting indebtedness and loaning the credit of counties, towns, cities and villages so as to prevent abuses in taxation assessments..." (See Flushing

National Bank v. MAC, 40 N Y 2d 731 (1976) Kelly v. Herry, 262 N Y L51, 160 (1933) Bank of Rome v. Village of Rome, 18 N Y 38 (1858).

Moreover, plaintiff's argument is limited to real estate taxes, yet §23.3 (a-h) is not so limited. The Legislature has "absolute discretion" to impose, amend or repeal any kind of local taxes (except for real estate taxes to pay debt service) [Gautier v. Ditmar, 204 N Y 20, 27 (1912); Quirk v. MAC, 41 N Y 2d 644 (1977).]

It should also be noted that Section 23.3 (a-h) does not restrict the City from levying taxes up to the permissible tax I limit established by the Constitution. There is nothing in the Act which precludes City officials from voluntary increasing the level of taxation within the constitutional limit if they believe it wise or appropriate to do so, as long as the City has given consideration to its financial ability to pay.

As Judge Fuchsberg noted in his concurring opinion in City of Amsterdam v. Helsby, 37 11 Y 2d 19, 41-(1975) regarding the effect of "panels' decisions":

> "... the Cities and Towns... remain free to make their own decision as to how they are going to meet such cost, whether by taxation, cut-backs in spending or other means."

Finally, the reasonableness of §23.3 (a-h) in holding down arbitration awards to amounts the City can afford within existing revenue resources is manifest (cf. Faturite Company v. Asbury Park, 318 U.S.502, 512 (1942).

Equal Protection

Plaintiff argues that §23.3(a-h) violates the Equal Protection Clauses of the Federal and State Constitutions since (Petition, paragraph 5) “it places plaintiff in a different position than that of any other brother police organization throughout the State of New York” and according to plaintiff it may render the bargaining position of the PBA a nullity.

The Taylor Law in Section 209 specifically provides that its impasse procedures are inapplicable to the fire and police organizations of New York City.

Section 212 of the Taylor Law provides that the local government may adopt its own impasse procedures and pursuant thereto the New York City Collective Bargaining Law was adopted (Admin. Code §1173.4.0). The effect of that legislation is that the PBA is classified with other New York City employee organizations for this purpose.

Since procedures of the NYCCBL are applicable to all municipal unions, including the PBA, with limited exceptions,

there is no inequality of treatment among the municipal unions.

The equal protection clause does not require absolute symmetry in classification, but all distinctions must be reasonably related to the Legislative objective, (People v. Acme Markets, 37 N Y 2d 326 (1975); Gleason v. Gleason, 26 N Y 2d 28 (1970).)

This Court believes that classification distinctions between New York City and upstate police and firemen and inclusion of the PBA in the NYCCBL are reasonable, that there was more than a minimal rational relationship between the classifications and a legitimate State purpose and that the Equal Protection Clauses are not violated..(Employees Union v. Helsby, 439 F. Supp. 1272, 1277 (S.D. N.Y.) 1977; Buonorata V. Commission of Correction, City of New York, 316 F. Supp. 556, (S.D. N.Y. 1970); Manes v. Golden, 400 F. Supp. 23 (E.D. N.Y.) aff'd 423 U.S. 1068 (1976); Rosenthal v. Harnett, 36 N Y 2d 269.)

Furthermore, Section 23.3(a-h) applies to all unions with which the City bargains. It does not create any new classification but merely affects the standards which are to be applied uniformly to impasse proceedings.

Plaintiff PBA also argues that the Equal Protection Clauses are violated-because those unions failing to reach settlement will find a diminishing share of the municipal budget

available to them. There are safeguards to prevent this in §23.3(e) and §23(c). Particularly, §23 (c) provides that voluntary wage and benefit agreements shall also be subject to the City's "financial ability to pay", thereby insuring equity and equal protection for all municipal unions. (Emphasis added). Plaintiff's argument that the bargaining position of the PDA may be rendered a nullity has no merit and does not warrant discussion.

Section 23.3 (a-h) and the Strike Prohibition

PBA contends that §23.3(a-h) deprives it of arbit ration as an available tool in contract negotiations in violat ion of the Equal Protection Clause and "that by so doing, the balance created by Article 14 of the Civil Service Law [The Taylor Law] is upset and the restrictions on strikes of public employees are similarly removed," (Petition, paragraph 16, 17, 18). The New York State Constitution does not confer upon public employees a constitutional right to collective bargain- ing. Their right to bargain collectively is merely statutory (Taylor Law, Article 14, §200) and strikes by public employees are banned. The earlier Condon Wadlin Law (Civil Service Law §108, repeal 1967) banned strikes and the present Taylor Law §210 imposes strict penalties for violation of the ban.

In 1974, the Taylor-Law (§209.4) provided for binding arbitration when negotiations reach an impasse. Plaintiff's arguments that these amendments were vitiated by §23.3(a-h) thereby "reinstating" the right to strike is merit less. The strike prohibition is not contingent upon procedures employed in the collective bargaining process.(Civil Service Forum. v. N.Y.C. Transit Authority, 3 Misc. 2d 346 (Sup. Ct., Kings Co., 1950) aff'd 4 A.D. 2d 117 (1957); Erie County Water Authority v. Kramerf 4,A.D. 2d 545 (1957) aff'd 5 N.Y. 2d 954.(],§59).) There can be no tradeoff or "balance" since it is the State's long standing and independent policy to prohibit strikes by public employees.

Home Rule

Plaintiff urges that Chapter 201 contravenes the constitutional home rule provision of Article IX, §2 (b)2 of the State-Constitution, since it is an act "in relation to the property, affairs or government" of a local government and, therefore, required a request by two-thirds of the members of the Legislature.

The court rejects this argument. A home rule request was not required since Chapter 201 treats matters of substant-ial and imperative state concern as set forth in the Legislative findings of the 1975 and 1978 Legislation. (Adler v. Deegan,

251 N Y 467 (1929).) This is true even though as Chief Judge Cardozo said in his concurrence at p. 439, this is a situation "where State and City Concerns overlap and intermingle". (Wambat Realty Corp. v. State 41 N Y -2d 490 (1977) Board of Education v. City of New York, 41 N Y 2d 535 (1977). Amsterdam v. Helsby, supra).

Actually, in Chapter 201, the Legislature has treated matters of far wider scope than the "property, affairs and government" of local government. Chapter 20.1, therefore, does not contravene Article IX, Section 2(b)2 of the Constitution.

Conclusion

The motions by defendants are granted to the extent of declaring the challenged legislation to be constitutional. In a declaratory judgment action, the complaint may not be dismissed even though plaintiff is not entitled to the declaration it seeks. (Sweeney v. Cannon, 30 N Y 2d 633, Lanza v. Wagner, 11 N Y 2d 317).

The motion for an injunction is denied.

Settle judgment.

DATED: December 11, 1978