Office of Collective Bargaining

In the Matter of an Impasse Between

City of New York (Board of Elections)

-and- I-170-83

Local 1183, Communications Workers of America

Appearances

For the City:

Carmen Suardy, Esq.

For the CWA:

Donna Dolan Brunner, Director of Communications Division

Impasse Panel Report and Recommendations

Procedural History and Background

The undersigned was designated as a one-man impasse panel in this dispute by the Office of Collective Bargaining by letter dated September 12, 1983. By agreement of the parties, a transcribed hearing was held in the offices of the Office of Collective Bargaining on October 18, 1983. At the hearing, the parties were afforded a full and complete opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Upon receipt of the transcript of the hearing by the undersigned on October 27, 1983, the hearing was deemed closed.

The bargaining unit consists of most employees of the Board of Elections below the level of management. It includes approximately 280 regular employees and a varying number of temporaries in clerical, mechanical, accounting and other titles. The function of the Board is to prepare for and to conduct elections.

The Board of Elections elected to come under the jurisdiction of the OCB in 1970, a decision which was approved by then Mayor Lindsay. The OMLR represents the Board in proceedings such as this one.

Issues

At the outset of these negotiations, the CNA submitted about 25 proposals to the City and the City submitted several proposals to the CWA. Following seven negotiating sessions, the parties had reached an agreement on all but three of these issues.

These issues are set forth below:

10. All References to Section 3-300 shall be deleted from the Contract and replaced by the phrase "Election Law.".

11. The following shall be a substitute for Article VII Section 1.(B).

"A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy, orders, or past"practice of the Board of Elections issued pursuant to its authority under the Election Law in reference to the terms and conditions of employment."

12. Employees who are subject to a disciplinary termination shall not be terminated until all appeals under the contract have been exhausted.

Positions of the Parties

The issues will be discussed in order. The first issue involves the CWA's proposal to delete references to "Section 3-300" and to replace them with the phrase "Election Law."

Section 3-300 of the Election Law reads as follows:

> 3-300 Board employees; appointment
>
> Every board of elections shall appoint, and at its pleasure remove, clerks, voting machine technicians, custodians and other employees, fix their number, prescribe their duties, fix their titles and rank and establish their salaries within the amounts appropriated therefore by the local legislative body and shall secure in the appointment of employees of the board of elections equal representation of the major political parties. Every commissioner in each board of elections except for commissioners of the board of elections of the city of New York, may approve and at pleasure remove a deputy, establish his title and prescribe his duties. In the city of New York, the board of elections shall appoint an executive director and a deputy executive director whose duties it shall be to supervise the operations of the board of elections under the supervision of such board.

The CWA proposes the replacement of the specific references to Section 3-300 with references to the more general "Election Law" which includes Section 3-300. The concern of the CWA is that the specific references to Section 3-300 can be and in fact have been used by the Board to intimidate employees. That

section specifically gives the Board the authority at its pleasure to remove employees. According to the CWA, this power, which the CWA explicitly recognizes the Board possesses, has been inappropriately utilized by the Board to remind employees of the Board's power over employees when there is a reluctance to accept an assignment, etc.

The CWA notes that Article VII, Grievance Procedure, Section 9 - Disciplinary Procedure, Paragraph (f) of the parties' agreement makes reference not to Section 3-300 but to the Election Law. This is the approach which the CWA proposes be followed throughout the agreement.

The City opposes changing the specific references to Section 3-300. The Election Law itself contains many provisions but, as far as this bargaining unit is concerned, the only provision which applies is Section 3-300. Since that is the section which applies, this is the appropriate one for mention in the parties' agreement. The City argues that it could create confusion to substitute a more general reference to the Election Law for the current more specific and limited reference to Section 3-300 of the Election Law.

The second issue concerns the definition of a grievance. Specifically, the CWA is proposing the addition of the words "past practice" to Section 1 (B) of that definition.

The demand had its genesis in a grievance which arose several years ago involving check cashing. That situation,

according to the CWA, culminated in a decision by the OCB that the matter could not be grieved because the words "past practice" did not appear in the contractual definition of a grievance. As a result, the CWA is seeking at the bargaining table to change the definition of a grievance so that it includes "past practice." This will permit the Union to represent its members more effectively, it is claimed.

The other major reason behind this proposal is that, although the definition of a grievance refers to rules and regulations and written policies or orders of the Board, the fact is that the Board has no written rules and regulations or policies or orders. Thus, all that the Union can rely upon is "past practice." During negotiations, the Union asked for the Board's written rules, regulations, policies and orders. It was told that there were none. There is, therefore, little that the Union can grieve.

At the hearing, the City introduced as an exhibit a stack of directives which it now claims are written policies, rules and orders. The Union asserts that virtually all of the proferred memos, some of which dated back to 1975, referred to specific situations and applied to a particular election. They are not the sort of things which normally would be considered rules and regulations or policies. The one exception was a memo dated August 19, 1983 which refers to a number of housekeeping and other issues in one of the five boroughs. This was

issued after negotiations had ended and, argues the Union, in contemplation of this proceeding so that it could be shown that the Board in fact does have written rules and policies. This is in distinct contrast to the situation in other agencies and departments where written rules and regulations exist.

In anticipation of a City argument, the CWA asserted that the Board of Elections and this bargaining unit are unique. The unit is vertical rather than horizontal. The job titles are all unique to the Board. The positions are unclassified. Section 3-300 gives extraordinary powers to the Board. The Board does not have anything to do with any other City departments. Job descriptions are not firm; the Board can assign employees as needed. For these reasons, it is argued, not only do the Board's employees need greater contractual protection than do other City employees but, because of their uniqueness, they can be treated differently without creating bothersome precedents for other units of employees.

The Board is opposed to adding the phrase "past practice" to the definition of a grievance for several reasons. First, it notes that the current definition of a grievance comports almost exactly in pertinent respects to the definitions in other City contracts including those with other CWA units.

Second, it argues that, since 1974, the City has demanded that only written policies be subject to grievance procedures. Thus, for this unit, the first written contract covered the

term from July 1971 through June 1974 and it referred to "existing policy" in the definition of a grievance. This language was changed in the July 1974 to June 1976 agreement to "written policy." The City was and is concerned that unwritten policies or "past practice" is too vague and subject to disagreement between the parties. It could generate much costly litigation. Therefore, the City opposes any reference to "past practice" in the definition of a grievance.

Third, if the City were to agree to include "past practice" in the definition of a grievance for this unit, it would be confronted with a demand for its inclusion in other units as well.

Fourth, the City argues that the documents introduced do constitute written rules, policies or orders which are subject to the grievance procedure. Therefore, there are things which the Union can grieve.

Fifth, the Board of Elections is claimed to be an agency where reference to "past practice" would be particularly inappropriate. What, it asks, is a past practice in an agency responsible for running elections? How long would a practice have to be in effect to constitute a past practice? The seasonal and changing nature of the Board's activity makes flexibility even more important here than in most other agencies.

The final demand relates to disciplinary terminations. The Union proposes that employees who are subject to disciplinary

termination not be terminated until all contractual appeals have been exhausted.

The CWA points out that employees of the Board, unlike other City employees, cannot submit grievances regarding disciplinary terminations to arbitration nor may appeals of such cases be pursued under Section 75 of the Civil Service Law. The final decision rests with the Board of Elections following a recommendation from the City's Director of Municipal Labor Relations or the Director's designee.

The Union asserts that although the contract sets forth time periods for various steps of the grievance procedure, things can and do get bogged down and delayed, especially at the OMLR level. Two instances were cited. In one, the case took over 11 months and in the other it took about five months to complete the various steps. These time periods create hardships for employees.

In support of this proposal, the Union draws an analogy with criminal cases where one is assumed to be innocent until found guilty.

The City opposes this proposal on several grounds. First, it points out that since discipline became subject to the grievance procedure at the Board of Elections in 1978, the Union cited only two instances of disciplinary terminations which were appealed. Thus, the problem is limited if it exists at all.

Second, the City notes that the grievance procedure contains time limits at the various steps and permits a progression to the next step if time limits are exceeded. It also permits the initiation of a grievance at Step IV if a decision satisfactory to the Union is not implemented in a reasonable time. These clauses serve to protect employees against excessive delays.

Third, the City observes that other City contracts provide for terminations to become effective following Step II, the same procedure which applies at the Board.

Fourth, with reference to the specific cases cited by the CNA, the City suggests that at least some of the delay resulted from settlement discussions and procedural issues raised by the Union.

Finally, the City asserts that an employee, in appropriate cases, may be reinstated with back pay, thus making the employee whole.

Discussion

There are three disputed issues which stand in the way of an agreement between the parties on the terms of the successor agreement. These issues will be discussed and recommendations will be issued thereon.

A fact which both parties pointed to is the uniqueness of the Board of Elections. The Election Law provides that the

Board has the power to appoint and remove employees. Employees of the Board are political appointees; they are not competitively selected through Civil Service procedures.

The first issue concerns references to Section 3-300 of the Election Law. The CWA seeks to remove those specific references and replace them with the more general reference to the "Election Law."

The Union's arguments for this change were not persuasive. Only one remote (1969) hearsay example was referred to where the Board allegedly threatened an employee with removal if he refused an assignment. Aside from the merits or lack of merits of that instance, the fact is -- and the Union concedes this -- the Board does have the statutory authority to remove employees. It can well be argued that employees are better served by being made aware through the collective bargaining agreement of the powers of the employer. To delete the reference to Section 3-300 from the contract would not remove those powers from the Board.

The parties agree that, of the numerous sections of the Election Law, only Section 3-300 applies to this contract. It is, therefore, possible to provide a specific reference to that section rather than a general reference which incorporates countless sections which do not apply.

It is my belief that not only the City but also the Union and the employees are better served in this situation by the specific reference to the applicable section of the law and I shall recommend no change in this regard.

The second issue involves the CWA's proposal that "past practice" be added to the definition of a grievance. With this proposal the Union is seeking to obtain a major and somewhat imprecise expansion of the definition of what constitutes a grievance. For several reasons, I do not recommend acceptance of this proposal.

This proposal attempts to reverse the clear trend and contravene a policy of the City under which, since 1974, the City has insisted upon the removal of references in the definitions of grievances in its contracts with unions to unwritten policies or practices. Thus, the contract between these parties in 1974 changed the words "existing policy" to "written policy" in the definition of a grievance.

There is no question but that the phrase "past practice" can lead to disagreements between parties. It can cause an increase in grievance filings and arbitrations without necessarily contributing to stability at the work place. If parties mutually and voluntarily agree to include "past practice" as part of their definition of grievance, that is all right. I am most reluctant, however, to recommend it in the absence of mutual agreement.

There is one factor which makes the Union is case stronger here than it would be in most other agencies and departments. I refer to the absence of a codified set of rules, regulations and policies. The somewhat haphazard collection of memos introduced by the Board hardly represents an organized set of rules

and procedures for employees to follow. The fact that the Board is a seasonal operation with changing needs and the requirement for flexibility does not overcome the need for written rules and policies.

Employers adopt rules for their benefit: to make known to employees their limits, procedures, etc. It does not serve the interests of the employer not to have a well-organized set of rules and policies for employees to be aware of and have access to. Therefore, I shall recommend that the Board undertake to codify its rules, regulations, procedures and orders so that they are available for examination by employees. This will contribute to consistency of treatment of employees and should promote efficiency and productivity. It will at the same time take away from the Union's argument to include unwritten practices as part of the definition of a grievance.

The third issue involves the Union's request that terminated employees be retained until all contractual appeals have been exhausted. I shall not recommend acceptance of this proposal. The case for this proposal is substantially less compelling in this unit than it would be elsewhere and, in any event, this would constitute a major change which would more appropriately result from bilateral agreement than from an impasse panel procedure.

Discipline for Board of Election employees is not subject to arbitration. The final decision rests with the Board. Although the negotiated procedure provides for independent

review of disciplinary actions by the OMLR, the fact remains that the OMLR simply makes recommendations back to the Board of Elections which had initially taken the disciplinary action. This is an added step which does provide an additional opportunity for outside review but the final decision remains with the Board. There is presumably less likelihood that the Board would reverse itself than there is that an arbitrator would reverse an employer's decision where arbitration is available. Therefore, there is less reason for the union's proposal here than there would be if there were arbitration.

Also, as the City argues, the contract does contain time limits at the various steps of the grievance procedure so, absent unusual circumstances or bilateral settlement discussions, appeals can generally be processed with relative dispatch.

Recommendations

I have carefully considered the evidence offered and the arguments of the parties on the three disputed issues and I hereby issue the following recommendations on these issues:

1) The contractual references to Section 3-30O should not be replaced with references to the Election Law.

2) The phrase "past practice" should not be added to Article VII, Section 1 (B) of the parties' agreement. The Board of Elections, however, should move expeditiously to develop and codify written rules, regulations, policies and/or orders. These should be accessible to the Union and to individual employees.

3) There should be no change in the existing provision whereby employees who are terminated for disciplinary reasons are terminated following the Board's written decision pursuant to Article VII, Section 9 (b) of the prior agreement.

Jeffrey B. Tener
Impasse Panel

Dated: November 5, 1983
Princeton, NJ

On this 5th day of November 1983 before me personally came and appeared JEFFREY B. TENER to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

DOROTHY FRIEDMAN
NOTARY PUBLIC OF NEW JERSEY