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State of New York Public Employment Relations Board Decisions from November 7, 1975

New York State Public Employment Relations Board

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#2A-11/7/75
SCARSDALE POLICE BENEVOLENT ASSOCIATION, INC., Respondent,	BOARD DECISION AND ORDER
-and-	
VILLAGE OF SCARSDALE, Charging Party.	CASE NO. U-1698

The charge herein was filed by the Village of Scarsdale (Village) on July 14, 1975. It alleges that the Scarsdale Police Benevolent Association, Inc. (PBA) committed an improper practice in violation of Civil Service Law §209-a.2(b) by refusing to negotiate in good faith with the Village. The gravamen of the charge is that PBA has submitted several negotiating demands that do not constitute mandatory subjects of negotiations and that, over the objections of the Village, it continued to insist upon those demands even after the negotiations dispute was submitted to a factfinder.

On September 29, 1975 the Village and the PBA entered into a stipulation in which they specified those demands of the PBA that the Village alleged to be non-mandatory subjects of negotiations; indicating the dispute was one that raised questions concerning the scope of negotiations, the parties jointly requested this Board to accord this matter expedited treatment, as provided in §204.4 of our Rules of Procedure. That request was granted and the parties were instructed to submit memoranda of law to us so as to reach us in advance of our meeting of October 24, 1975. This was done.

Applicable Decisions

Scope of negotiations under the Taylor Law has been considered by the Court of Appeals in Board of Education v. Associated Teachers of Huntington, 30 NY2d 122 (1972); Syracuse Teachers' Association v. Board of Education,

35 NY 2d 743 (1974); West Irondequoit Teachers Association v. Helsby, 35 NY 2d 46 (1974); and Susquehanna Valley Central School District at Conklin v. Susquehanna Valley Teachers Association, ___ NY 2d ___ (1975).

Most relevant of our own decisions are Matter of City School District of the City of New Rochelle, 4 PERB 3704 (1971); Matter of City of White Plains, 5 PERB 3013 (1972); Matter of City of Albany and Albany Police Officers Union, 7 PERB 3132 (1974); Matter of City of Albany and Albany Permanent Professional Firefighters Association, 7 PERB 3142 (1974); Matter of Board of Higher Education of the City of New York, 7 PERB 3042 (1974); and Matter of Yorktown Faculty Association, 7 PERB 3051 (1974).

The above-cited Court of Appeals' decisions set forth the nature of the duty to negotiate. Public employers and recognized or certified employee organizations are under a duty to negotiate over terms and conditions of employment except to the extent that this duty is limited by plain and clear prohibitions in a statute or in decisional law, or where an agreement would conflict with an essential public policy of the State. This concept was first articulated by us in the New Rochelle case, in which we held (at page 3706):

> "A public employer exists to provide certain services to its constituents, be it police protection, sanitation or, as in the case of the employer herein, education. Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees (footnote omitted)."

In the White Plains and in the two Albany cases, we applied the New Rochelle concept to specific negotiations demands and determined that some were, and others were not, mandatory subjects of negotiations. In the Board of Higher Education of the City of New York and Yorktown cases, we determined that an

employee organization violates CSL §209-a.2(b) when it continues to insist upon non-mandatory subjects of negotiations during factfinding.

Implications of Compulsory Arbitration

In its brief, the Village notes that in past cases in which we have found a demand to constitute a mandatory subject of negotiations we occasionally remarked that an employer's arguments against being compelled to negotiate went to the merits of the proposal itself, rather than to the mandatory nature of its negotiability. The Village comments:

> "Generally, such a retort was satisfactory since, until recently, under the Taylor Law, a final agreement covering the terms and conditions of employment between a public employer and its employees required the assent of the elected representatives serving on the appropriate governing body.
>
> "However, since the advent of compulsory binding arbitration, a determination of an arbitrator may be imposed covering terms and conditions of employment without the assent of the representatives of the people."

The Village concludes that the availability of compulsory arbitration requires a more restrictive definition of mandatory subjects of negotiations. This argument articulates an unhappiness with the statute itself. It was rejected by us in the two Albany cases. We find nothing in the language of the legislation establishing compulsory arbitration that would impose restrictions upon the duty to negotiate over terms and conditions of employment.

Discussion

There now follows seriatum the demands of the PBA, the mandatory negotiability of which -- according to the stipulation of the parties -- is in question.

Demand No. 2 - "All promotions are to be filled within thirty (30) days after vacancy."

PBA argues in support of this demand that the filling of all vacancies, including supervisory vacancies, is important to protect the safety

of the remaining employees. The Village responds that the demand would preclude it from effecting a staff reduction and is, therefore, not a mandatory subject of negotiations. We agree with the Village. A demand that would restrict reductions in staff size is a permissive and not a mandatory subject of negotiations (see Susquehanna Valley Central School District at Conklin, supra).

Demand No. 4 - "If any mechanical or safety defect in a patrol vehicle has been properly reported and not corrected within 2 days, such police vehicle shall be considered not fit for use by the Police department, and removed from service until the mechanical or safety defect has been corrected."

The PBA justifies this demand on the ground that it is closely related to the safety of policemen. The Village objects on the ground that it goes beyond safety. It alleges that there may be mechanical defects in a vehicle that would not involve safety. It appears that the dispute between the parties is one of semantics, rather than of substance. The PBA may demand that unit employees not be required to ride in unsafe vehicles. Insofar as this demand may be construed to go beyond this, it is non-mandatory. Certainly the PBA cannot demand that a vehicle be removed from service, rather than assigned to a non-unit employee.

Demand No. 5 - "No Superior Officer shall assign, direct, or order a member to operate a municipal vehicle which is mechanically deficient or does not satisfy the safety requirements of the New York State Vehicle Inspection Law."

Both parties see this demand as being a paraphrase, and perhaps an elaboration, of Demand No. 4, for their arguments regarding it are the same as those regarding Demand No. 4; so is our conclusion. It is a mandatory subject of negotiations to the extent that it involves safety.

Demand No. 6 - "No member shall be assigned, directed, or ordered to do any type of repair on any Police patrol vehicle."

This demand relates to job content. The Village argues that an agreement on job content would restrict its managerial prerogative to structure

a police department capable of performing all necessary work within the department. We determine that job content of current employees is a mandatory subject of negotiations so long as the negotiations demand would not narrow the inherent nature of the employment involved. The demand under question would not so narrow the nature of the work of policemen (see Unconsolidated Laws §577-A.21).

Demand No. 7

In its brief to us, PBA withdrew Demand No. 7. Ordinarily, in deciding whether a party has negotiated in bad faith by insisting upon a non-mandatory subject of negotiations during factfinding, the issue would not be mooted simply because the demand was subsequently withdrawn. Where, however, the matter is brought to us under §204.4 of our Rules, pursuant to which we resolve questions regarding the nature of mandatory subjects of negotiations, the withdrawal of a demand takes the issue away from us.

Demand No. 8 - "If a member is investigated by any unit or appointee of this Department, he shall be notified at the completion of the investigation as to the results thereof."

This demand goes too far. Police departments generally investigate suspected and actual crimes, including suspected and actual crimes by policemen. A policeman who is investigated for possible criminal conduct is in the same position as is any other citizen. His rights are those that are afforded to him by law, as interpreted by the courts.

Demand No. 9 - "A. The Department shall destroy or give to the employee, at the Member's sole option, the original and all copies of any anonymous correspondence or memorandum in relation to phone calls received concerning violations of the Rules of Procedures by the Member.

"B. The municipality shall not honor or investigate any anonymous complaint against any member."

As in the case of Demand No. 4, it appears that the dispute is one of semantics, rather than of substance. In its brief, PBA conceded that it can neither prevent the police department from receiving anonymous calls nor

require it to make all such calls known to the person claimed to have been derelict. It has, therefore, clarified its demand to preclude placing in the personnel file of an employee information received during an anonymous call unless the information is verified, and that only if such information is to be placed in the individual employee's file must he be made aware of it. For its part, the Village has written in its brief, "These proposals are far different from a legitimate demand involving the use of unsubstantiated material against an officer, e.g., the placing of such material in a personnel folder." Thus, there appears to be no disagreement as to scope of negotiations.

Demand No. 10 - "A. No member shall be subject to any investigation, interrogation, or interview in relation to any type of disciplinary action without first being presented with a copy of an accusitary report, instrument, or document that is signed by the accusor. Upon receipt of the accusitary instrument, the member shall not be required, requested, or ordered to make any statement, written or oral, without being represented by the PBA.

"B. Upon the receipt of any document described in Section A, the department will notify the member accused by furnishing him with a certified copy of the document. The member shall then be allowed reasonable time to contact and have present a PBA representative before any questioning takes place."

To the extent that this demand applies to preliminary investigations, it is not a mandatory subject of negotiations. To the extent that it involves procedures during a disciplinary proceeding it is, provided, however, that the Village can only be compelled to negotiate over procedures not specified in law. Unconsolidated Laws §5711-Q.9 specifies certain details for disciplinary proceedings involving policemen and leaves other details for rules and regulations to be adopted by the employer. Insofar as it is discretionary, the content of those rules and regulations constitutes a mandatory subject of negotiations, but the Village cannot be compelled to negotiate for the inclusion in its contract of provisions identical with those in the statute, (See Matter of City of New Rochelle, 8 PERB ¶3071 (1975).

Demand No. 12

PBA withdrew this demand in its brief to us. Our comments on Demand No. 7 apply.

Demand No. 14 - "The municipality shall maintain an organizational structure which is based on the following:

Chief of Police
7 Lieutenants
10 Sergeants
5 Detective Patrolmen
31 Police Patrolman"

We have declared similar demands not to be mandatory subjects of negotiations in the White Plains decision, supra. The Court of Appeals has agreed in its Susquehanna Valley decision, supra.

Demand No. 15 - "Any delay in cash benefits (salary, paid holidays, welfare benefits etc.) shall be subject to 6% penalty per month to be paid by the municipality upon payment of such cash benefit."

General Municipal Law §3-a provides that the rate of interest to be paid by a municipal corporation for an approved claim against it shall not exceed 3% per annum. The demand herein for a 6% interest is, therefore, a prohibited subject of negotiations.

Demand No. 16

PBA withdrew this demand in its brief to us. Our comments on Demand No. 7 apply.

Demand No. 17 - "The Department shall institute two-man patrol coverage."

PBA had originally argued in favor of this demand on the ground that it was important to assure unit employees of adequate safety. It has, however, withdrawn that demand in favor of one that would require the Village to put a screen between the front and back seats of cars so as to protect a one-man patrolman from a prisoner. Apparently the Village resists this revised demand on its merits and not on the ground that it is not a mandatory subject

of negotiations; thus, in accordance with our comments on Demand No. 7, it is unnecessary for us to reach the question.

Demand No. 18 - "A. Work Schedules shall be posted at least six (6) months in advance.
B. In the event that a member's work schedule is changed and he received less than ninety (90) days notice o[f] the change, he shall be [co]mpensated the sum of one hundred dollars ($100) for the disruption of his family and personal life to be paid within thirty (30) days of his notification of change of work schedule.
C. In no event may a member's schedule be changed without at least seven (7) days prior notice.
D. All changes in work schedule must be in writing and delivered in person to the member."

The Village argues against this demand on the ground that "It would restrict the Village from ever changing officers' work schedules." (emphasis in original). It also argues that the demand would prevent it from calling in necessary personnel in the event of an emergency. PBA responds that advance knowledge of a work schedule permits an employee to make preparations for use of his leisure time. It argues that the demand is not designed to interfere with the authority of a police department to call in policemen in the event of an emergency. Except for paragraph C of the demand, the dispute involves the merits of the proposal, rather than the mandatory nature of its negotiability. On its face, paragraph C might prevent the Village from calling in policemen in the event of an emergency and, to the extent only it is not a mandatory subject of negotiations.

Demand No. 20

PBA withdrew this demand in its brief to us. Our comments on Demand No. 7 apply.

Demand No. 21 - "All patrol vehicles shall be equipped with air conditioning as agreed to in previous negotiations."

The Village argues that, because the availability of air conditioning in patrol vehicles has no safety implications, it is not a mandatory

subject of negotiations. The PBA responds that the availability of air conditioning affects the comfort of employees and is thus a term and condition of employment which is subject to mandatory negotiations. We agree with the PBA. The Village's objections are more properly directed to the merits of the demand than to its negotiability.

Conclusion

NOW, THEREFORE, in view of the above conclusions of law, we dismiss the charge with respect to all those matters considered herein that we determined to be mandatory subjects of negotiations, and with respect to those matters that we determined not to be mandatory subjects of negotiations,

WE ORDER the Scarsdale Police Benevolent Association, Inc. to negotiate in good faith with the Village of Scarsdale.

Dated: New York, New York
November 7, 1975

Robert D. Helsby, Chairman

Joseph R. Crowley

Fred L. Denson

STATE OF NEW YORK

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#2B-11/7/75
BALDWIN SANITARY DISTRICT NO. 2, Respondent,	BOARD DECISION AND ORDER
- and -	Case No. U-1236
NICHOLAS PETRO and NASSAU CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., Charging Parties.	

This case involves a charge that the employer, Baldwin Sanitary District No. 2 (employer) (a) discriminatorily discharged Nicholas Petro, a temporary employee, in violation of Sections 209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act)[1]; (b) that the employer unilaterally decreased the percentage increase contractually provided for in violation of Sections 209-a.1(a) and (d) of the Act.[2]

The hearing officer found (a) that Petro's termination was discriminatorily motivated and constituted a violation of Section 209-a.1(c) of the Act;

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1. These sections of the Act make it an improper employer practice to deliberately "(a) interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights;...(c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization;...."

2. As originally filed, the charge alleged that Petro had been threatened with layoff if he persisted in seeking CSEA's assistance in clarifying his employment status with the District.
Both the original and the amended charge contain a second count alleging that the District improperly refused to check off dues from Petro on behalf of CSEA. However, the uncontradicted evidence establishes that neither CSEA nor Petro had ever requested dues checkoff and Petro had never even executed a checkoff authorization card. The hearing officer dismissed this charge.

(b) that the employer's unilateral action in not implementing the contractual increase violated Section 209-a.1(d) of the Act.

The employer filed exceptions to the hearing officer's decision and recommended order. We have reviewed the filed exceptions and do not find them meritorious. We affirm and adopt the findings, conclusions and recommended order.

NOW, THEREFORE, WE ORDER:

(1) With respect to the violation of CSL Sections 209-a.1(a) and (c) that Baldwin Sanitary District No. 2 restore the status quo as it existed in August, 1974 by (a) offering Petro employment with it on the same basis as he was employed during August, 1974; (b) making Petro whole for any loss of earnings as a result of his termination; and (c) reconsidering Petro's appointment to permanent full-time status in a manner consistent with the findings of fact herein;

(2) With respect to the violation of CSL Section 209-a.1(d), in view of the findings of fact and conclusions of law and in view of the specific violation of the Act that we have found to have occurred, the Baldwin Sanitary District No. 2 shall negotiate in good faith with the Nassau Chapter, Civil Service Employees Association, Inc.

Dated: New York, New York
November 7, 1975

Robert D. Helsby, Chairman

Fred L. Denson

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CONCURRING OPINION

I concur in the result reached by my associates.

As to the violations of CSL Section 209-a.1(a) and (c), I agree with their analysis. As to the violation of CSL Section 209-a.1(d) my analysis differs from theirs.

I do not find a violation based upon a failure to implement fully the contractual obligations in view of the uncertainties expressed by the Cost of Living Council.[1] The directives of that body were rather imprecise and I would not impose the stigma of statutory violation upon those who had to act in the face of such official uncertainty. However, I find that subsequent to the expiration of Federal controls, the employer's failure to furnish information as to its alleged compliance with its contractual obligations was a violation of its duty to negotiate in good faith.

Dated: New York, New York
November 7, 1975

Joseph R. Crowley

Joseph R. Crowley

1. See also my dissent in Matter of Town of Orangetown, 8 PERB 3069 at 3072.