Matter of City of New York v New York City Bd. of Collective Bargaining
2015 NY Slip Op 31383(U)
July 17, 2015
Supreme Court, New York County
Docket Number: 451289/14
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner (s),

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THE NEW YORK CITY BOARD OF COLLECTIVE BARGAINING and UNITED FEDERATION OF TEACHERS, LOCAL 2, AFL-CIO,

Respondent (s).

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DECISION/ ORDER
Index No.: 451289/14
Seq. No.: 001, 002, 003

PRESENT:
Hon. Lynn R. Kotler
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Paper	**Numbered**
Pet's n/pet, ver pet, exhs	1
Resp BCB's n/mot, MOL, exhs	2
Resp UFT's n/mot, LMS affirm in opp	3
Pet's Opp MOL	4
Reply Memo (UFT)	5
Reply Memo (BCB)	4

Upon the foregoing papers, the decision and order of the Court is as follows:

In this Article 78 proceeding, petitioner The City of New York (the "City") challenges the determination of respondent The New York City Board of Collective Bargaining ("BCB"), dated April 3, 2014, 7 OCB2d 12 (BCB 2014), Docket No. BCB 2849-10, (the "Second BCB Determination") in which respondent BCB held that the petitioners violated §§ 12-306(a)(1), 12-306(a)(4), and 12-306(a)(5) of the New York City Administrative Code, a part of the New York City Collective Bargaining Law ("NYCCBL"), when the City issued a letter, dated March 26,

2010, ("March 26th Letter") regarding the existence of a weekly limit on total hours worked by hearing officers (motion sequence number 001). Since 2008, respondent United Federation of Teachers, Local 2, AFL-CIO ("UFT") has been negotiating with the City on behalf of hearing officers to reach a collective bargaining agreement.

Respondents BCB and UFT move to dismiss the petition (motion sequence number 002 and 003, respectively). Motion sequence numbers 001, 002 and 003 are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

Facts and arguments

Hearing officers are part-time City employees, also called "per session" employees, who were assigned to the Environmental Control Board ("ECB"), the Taxi and Limousine Commission ("TLC") and the Department of Health and Mental Hygiene ("DOHMH") to preside over hearings. Hearing officers are now assigned to the City's Office of Administrative Trials and Hearing ("OATH"), which administers the tribunals of the ECB, TLC and DOHMH. The most recent job specification for hearing officers, issued in 1998, contained a "Note" which stated: "No incumbent shall work more than 17 hours per week in any two consecutive weeks, or more than 1,000 hours per year." On March 26, 2010, the City issued the March 26th Letter to all hearing officers, which stated:

> Under the [DCAS] job specification for the position of "hearing officer (per session)", your employment as a judge/hearing officer at [DOHMH], [ECB], and/or [TLC] may not exceed 17 hours per week in any two consecutive weeks[.]

The March 26th Letter also indicated, *inter alia*, that a 1,000 annual hour cap would be enforced. This same "Note" was included in several job postings throughout the agencies, ranging from 2006 to 2012.

On March 29, 2010, the UFT filed an improper practice petition against the City on behalf of the hearing officers (the "First Petition") regarding the 1000 annual hour cap. BCB conducted a three-day hearing regarding the First Petition. As a result, BCB issued determinations dated January 5, 2011, July 10, 2012 and July 10, 2013 (collectively the "First BCB Determination") which granted the First Petition in part, and found in relevant part that the annual cap contained in the March 26, 2010 was impermissible. The City brought an Article 78 petition challenging the First BCB Determination, which the Hon. Kathryn Freed denied in a decision dated August 14, 2014 in *Matter of City of New York v. NYC Bd. of Collective Bargaining,* Index No. 451411/13 (the "8/14/14 Decision"). In the 8/14/14 Decision, Justice Freed found that the First BCB Determination that the March 26, 2010 Letter "unilaterally changed a mandatory subject of bargaining [] was supported by substantial evidence."

On July 28, 2010, UFT filed another improper practice petition against the City on behalf of hearing officers from which the instant Article 78 arises (the "Second Petition")[1]. In the Second Petition, UFT asserted essentially the same claims as the First Petition, arising from the City's enforcement of weekly and monthly caps. Specifically, UFT claimed that the City, beginning with the March 26, 2010 Letter, unilaterally restricted the number of hours hearing officers could work on both a weekly and monthly basis, in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a), (1), (4), and (5)2 The City argued that the weekly limit on hours was longstanding, motivated by a desire to control benefit eligibility; that the March 26, 2010 Letter merely clarified an existing policy; and that the application of the weekly limit constitutes a non-discriminatory exercise of its managerial right to schedule hearing officers pursuant to NYCCBL § 12-307(b). Additionally, the City argued that UFT failed to meet its burden of proof with

1 UFT subsequently filed an amended petition on August 3, 2011.

regard to its allegation that the City implemented a monthly limit on hours. After a six day hearing, BCB issued the Second BCB Determination, which found that the City violated NYCCBL § 12-306(a)(1), (4), and (5), by making a unilateral change in the hours worked per week by these Hearing Officers but that the City did not unilaterally change in the hours worked per month.

In the instant petition, the City argues that the Second BCB Determination is irrational, arbitrary and capricious. The petition asserts two causes of action: [1] the Second BCB Determination is arbitrary, capricious and an abuse of discretion because BCB essentially amended the Job Specification and job postings for hearing officers to delete the weekly cap (first COA); and [2] BCB made erroneous findings, incorrectly interpreted and applied relevant law and acted arbitrary and capricious in finding that the City violated NYCCBL §§ 12-306[a] [1], [4] and [5] (second COA).

Respondents move to dismiss because the petition fails to establish that the Second BCB Determination is arbitrary, capricious or contrary to law. Moreover, respondents argue that "[t]he City makes the same legal arguments that [Justice Freed] already rejected" in the 8/14/14 Decision. Finally, respondents maintain that the Second BCB Determination was supported by evidence adduced during the hearing. In turn, the City maintains that the facts concerning the weekly hour cap differ from those concerning the annual hour cap. The City also maintains that BCB "cited to in applicable BCB precedent in making its decision" and "failed to follow its own precedent that supports Petitioners' position."

Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law;

or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[Tlhe proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck. Westchester County*, 34 NY2d 222, 231 [1974]) (emphasis removed); *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 (1967).

NYCCBL § 12-305 provides, in pertinent part, that:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

NYCCBL § 12-306 (a) provides, in pertinent part, that:

> It shall be an improper practice for a public employer or its agents:
>
> 1. to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter;
>
> ...
>
> 4. to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;
>
> 5. to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

NYCCBL § 12-307 (b) provides, in pertinent part, that:

> It is the right of the [C]ity ... acting through its agencies, to determine the standards of services to be offered by its agencies; ... direct its employees; ... maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; ... and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of

> the [C]ity ... on those matters are not within the scope of collective bargaining, but ... questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment ... are within the scope of collective bargaining.

Here, the motions to dismiss must be granted and the petition denied. The gravamen of the petition is that BCB made a mistake of law and otherwise centers on a dispute of the factual findings made by BCB. As the Court of Appeals has explained, a determination by BCB as to "whether a particular subject matter is bargainable" should not be upset unless arbitrary and capricious or an abuse of discretion (*Levitt v. Board of Collective Bargaining of the City of New York, Office of Collective Bargaining*, 79 NY2d 120, 128 [1992]). BCB has held that hours is a matter within the scope of collective bargaining under NYCCBL § 12-306(a)(4) and unilateral changes in a mandatory subject of bargaining "constitute a refusal to bargain in good faith and, therefore, an improper practice. (DC 37 L. 3631, 4 OCB2d 34, at 11 [BCB 2011]).

Here, BCB found that the City made a unilateral change in hours by virtue of the March 26, 2010 Letter because for many years before 2010, the weekly cap had not been enforced. BCB reached this decision despite the "Note" in the job specification and job posting, based upon testimony of hearing officers and their pay stubs showing that hearing officers had exceeded 17 hours a week in any two consecutive weeks. The City's arguments that the job description and job postings contained the weekly hours cap or that the March 26, 2010 Letter constituted an exercise of the City's right to manage work schedules. The Second BCB Determination was not made "without regard to the facts" as the City contends (*Matter of Pell, supra* at 231). Rather, BCB's finding was based on the City's failure to present any evidence that the Weekly cap had been enforced for at least nine years prior to the March 26, 2010 Letter. On this record, the court cannot find that the Second BCB Determination was arbitrary, capricious or legally impermissible. BCB rationally concluded that the March 26, 2010 Letter curbed hours, a

mandatory subject of collective bargaining, and that this action was unilateral. Therefore, respondents' motions to dismiss are granted and the petition is denied.

Conclusion

In accordance herewith, it is hereby

ORDERED that respondents' cross-motions to dismiss (motion sequence number 002 and 003) are granted; and it is further

ORDERED that the petition is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: July 17, 2015
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.