Law Enforcement Officers Union, Council 82

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO
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December 10, 2007

ALJ Jean Doerr
State of New York
Public Employment Relations Board
The Electric Tower
535 Washington Street, Suite 302
Buffalo, New York 14203-1415

VIA FAX (716.847.3690) AND MAIL

Re: ***Albany Police Officers Union and City of Albany***
PERB Case No.: U-27073
Council 82 No.: 05-087

Dear Judge Doerr:

Please allow this letter to serve as the Union's supplemental brief as permitted by your letter dated November 15, 2007.

Please note that the Union, the Charging Party, objects inclusion in the record certain information which was not specifically requested by your letter dated November 15, 2007. Specifically, the Union objects to the inclusion in the record the Respondent's statement, "Although you did not ask, the City believes it is now important to identify any additional dates when the parties met. Formal (with relevant parties present) meetings occurred on February 23, 2007." (Respondents Letter dated November 30, 2007). Your Honor did not solicit this purported factual statement, and it should not, therefore, be included in the record.

As to the issue of whether the issue of health insurance co-pays raised for the first time following mediation may be properly submitted to interest arbitration panel, the Charging Party maintains its position that inclusion of the health insurance co-pay matter to the interest arbitration panel is not proper under the Act.

The key to determining if a disputed matter should proceed to interest arbitration is whether the parties negotiated the matter fully prior to impasse and filing of the petition for interest arbitration (*Matter of Buffalo Prof. Firefighters Assn.*, 30 PERB ¶ 4524). While a general subject may have been discussed, "the policy of the Act encourages and requires the that the parties take the opportunity to resolve their specific areas of disagreement" (*Matter of Croton Police Assn.*, 16 PERB ¶ 4603 [1983][holding proposals not discussed during pre-impasse negotiations are not properly presented to mandatory interest arbitration]).

In *Matter of Buffalo Prof. Firefighters Assn.*, 30 PERB ¶ 4524, Your Honor held that a matter discussed for the first time in mediation is not properly an interest arbitration panel. The charging party alleged that a demand not raised in pre-impasse negotiations was not properly before the interest arbitration panel and should be withdrawn. Agreeing with the charging party, Your Honor stated, "The requirement that an issue be negotiated to the point where arbitration is appropriate is not satisfied when initial discussion of a proposal takes place at mediation and a copy provided thereafter."

Here, no proposal concerning heath insurance of any kind was presented in negotiations by the Respondent. The Respondent in its written proposal submitted to the Charging Party stated "proposal to follow" concerning health insurance. From that time on no written proposal followed prior impasse and mediation. Consistent with Your Honor's decision set forth above, a party may move to preclude the matter from proceeding to the interest arbitration panel, notwithstanding the fact the party engaged in good-faith by discussing the new matter in attempting to resolve the impasse. Even though the parties discussed and agreed to include health insurance co-pays in their post-impasse tentative agreements, co-pays are raised for the first time and should be deemed not properly before the interest arbitration panel.

Another matter, *Matter of Southold Town Police Benevolent Assn., Inc.*, 14 PERB 4613 (1981), is directly on point with the instant matter. In *Southold*, the union sought to negotiate at mediation a proposal not submitted at negotiations. The employer refused. Thereafter, the Union submitted the at-issue proposal which was raised for the first time at mediation to interest arbitration.

It was held that only matters negotiated prior to impasse, and not those raised for the first time at mediation, are properly submitted to interest arbitration. Failing to negotiate prior to mediation precluded the matter from proceeding to interest arbitration. It should be noted that the assistant director did not hold that parties cannot raise new issues at mediation for the specific purpose of resolving the impasse, but it would be improper to advance that new issue to arbitration.

As in *Southold*, the Respondent permissibly raised the new co-pay matter post-mediation as a possible resolution to their impasse. However, once mediation fails, the issue of whether co-pays are properly before the interest arbitration panel turns on whether the parties negotiated the matter prior to declaring impasse.

It is submitted that the parties did not negotiate health insurance co-pays prior to impasse. The issue of health insurance co-pays was raised by the Respondent for the first time post-mediation in an attempt resolve the parties' dispute. As such and consistent with the holding in *Southold* and *Buffalo Firefighters*, the issue of co-pays should be withdrawn from interest arbitration because they were not negotiation pre-impasse and raised for the first time following mediation.

As a matter of labor relations policy, it is submitted that the parties' conduct following a declaration of impasse should not color the dispute being presented to an interest arbitration panel. It is clear that a matter must be discussed fully and prior to

impasse to be properly before an interest arbitration panel. The simple fact in this case is that **no proposal** concerning health insurance co-pays was discussed at pre-impasse negotiations between the parties.

It is submitted that to hold that a matter discussed at mediation for the first time is be a proper subject for interest arbitration would be disastrous for post-impasse dispute resolution procedures; particularly, mediation. Parties would fold-up and be loath to discuss new matters for fear that any objection to those matters could be waived through those discussion should the matter proceed to interest arbitration.

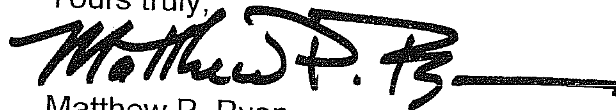
Likewise, unscrupulous parties seeking to inject matters not discussed in good faith may bait parties into discussing matters without an intent to settle only to use the post-impasse interaction as a mechanism to bring otherwise improper subjects before the interest arbitration panel. A party's willingness to engage in pre-arbitration dispute resolution would severely compromised if parties were allowed to raise new matters not negotiated pre-impasse and submit those matters to interest arbitration.

As such, only matters presented and negotiated prior to impasse should be submitted to interest arbitration. This would undoubtedly allow the parties to have open discussions at mediation and resolve their impasse knowing that their objection to improper subjects is preserved. Thereafter, should the matter proceed to interest arbitration, the parties would be free to object to matters not properly advanced to interest arbitration.

This is not to say that parties are not free to submit new counter proposals to matters properly negotiated prior to mediation at mediation, and, thereafter, submit those counter proposals to interest arbitration. Only new matters not negotiated prior to impasse and raised for the first time at mediation, or afterward, should be precluded (see, *Matter of PBA of Wapingers Falls*, 40 PERB ¶ 4529 [2007][holding that a party's new proposal made at mediation is proper where the parties negotiated the matter at the bargaining table; but, stating that a new matter not negotiated prior to mediation is not properly submitted to interest arbitration]).

Based upon the foregoing, the Charge with respect to the health insurance co-pay matter should be sustained.

Yours truly,



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