SSEU, Local 371, 1 OCB2d 11 (BCB 2008)

(IP) (Docket No. BCB-2653-07).

Summary of Decision: The Union claimed that the City failed to bargain in good faith over the salaries of new hires and transferred employees whom it allegedly paid in excess of previously negotiated contract rates, and refused to provide information concerning the salaries paid the new hires and/or transferred employees. The Board found that the Union was entitled to the information for the purpose of contract administration and that the City had a duty to provide it. Accordingly, the Union's petition is granted in part, with the remaining claims held in abeyance pending receipt by the Union of the information ordered to be provided herein. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, DISTRICT COUNCIL 37,

Petitioners,

-and-

THE NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES

Respondent.

INTERIM DECISION AND ORDER

On October 1, 2007, Social Service Employees Union, Local 371, District Council 37, ("Union") filed a verified improper practice petition against the New York City Administration for Children's Services ("ACS"). The Union alleges that the City violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-

306(a)(1), (4) and (5), when it refused to bargain over ACS's decision, with respect to new hires and certain other employees filling positions under an agency reorganization plan, to pay salaries in excess of rates previously negotiated in the parties' collective bargaining agreement and when ACS refused to provide information which the Union requested with regard to the salaries paid to the new hires and transferred employees. The City argues that it exercised its statutory right to determine standards for selection for employment and consequent salaries within the contractually agreed salary range. The City also asserts that ACS met voluntarily with the Union to discuss the Union's concerns, but that the City had no duty to bargain over the salary rates which were ratified by the Union in the applicable collective bargaining agreement. Further, the City argues that neither an independent nor a derivative claim of interference under the NYCCBL has been stated because there was no interference with the statutory rights of ACS employees. This Board finds that the Union is entitled to the salary information requested for the purpose of contract administration and that the City is therefore obligated to provide said information. Accordingly, the petition is granted as to the information request component, and the City ordered to provide the salaries paid the new hires an/or transferred employees in the successor titles at issue herein. Because the remaining issues in this case cannot be determined prior to the provision of the requested information, the remaining claims shall be held in abeyance pending receipt by the Union of the information sought herein, and further proceedings, if any, as necessitated by the provision of such information.

BACKGROUND

ACS provides child welfare services for children and families in the City of New York for the purpose of preventing abuse and neglect of children. According to the City, some 1,450

employees function in the titles of Child Welfare Specialist ("CWS") and Child Welfare Specialist Supervisor ("CWSS"). Some 650 employees in those titles work in the ACS Office of Case Management, reviewing documents submitted by what the City describes as "preventive and foster care agencies."[1] In March 2006, under a mayoral directive to improve the City's child-protective services, ACS initiated the first phase of its Action Plan for Child Safety, including the hiring of new staff. The second phase included a program to improve oversight of work done by the contract agencies for the City, entitled "Improved Outcomes for Children," or "IOC."

The parties to this proceeding are signatories to a collective bargaining agreement for the period of July 1, 2005, to June 30, 2008 which was ratified on March 9, 2007 ("Agreement").[2] In addition, the Union asserts, absent any dispute, that the parties are subject to the Citywide Economic Agreement for the period from July 1, 2005 to March 2, 2008 whose wages rates were effective

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[1] Although the City does not explicitly say so, we take it to mean that these "preventive and foster care agencies" are the private, non-profit organizations hired by the City to perform those services ("contract agencies").

Further, several job titles are referenced in the parties' pleadings. The Union asserts that "Child Evaluation Specialist" ("CES") is a civil service title subject to change under the mayoral Action Plan for Child Safety from "Child Welfare Specialist Supervisor [Level] II" to "Supervisor [Level] III Social Work." The cited Agreement does not reference "Child Evaluation Specialist" as a title but does refer to the titles "Child Protective Specialist" and "Child Welfare Specialist." The City generally denies the that the Agreement referred to encompasses a position titles "Child Evaluation Specialist" but, in its answer, then refers to that title. (Ans. ¶ 27.) This discrepancy need not be resolved, however, as this confusion does not impact the issue in this proceeding.

[2] The City's answer asserts that the applicable collective bargaining agreement was that from July 1, 2002 through June 30, 2005, and provides a copy of that agreement. (Ans. ¶23, Ex. A). In the petition, the Union did not specify the dates of the applicable collective bargaining agreement it cited although the excerpt it produced as an Exhibit appears to be from that applicable from July 1, 2005, to June 30, 2008; the Union did not in its reply dispute the City's contention that the applicable contract was in *status quo*. After a conference held on January 18, 2008, the parties were able to advise that the agreement from July 1, 2005 through June 30, 2008 had been ratified and was that referenced in the pleadings. Thus, the arguments contained in the answer sounding in *status quo* were withdrawn by the City in a letter dated January 25, 2008.

February 1, 2007.

The City has alleged that, on May 15, 2007, a meeting concerning the ACS reorganization took place involving, among others, the ACS General Counsel, two Assistant Commissioners of the New York City Office of Labor Relations ("OLR"), and representatives of the Union. The City states that one topic of discussion at this meeting was "transitioning the CES titles to the Supervisor III IOC title." (Ans. ¶ 27.) The City further alleges that, on July 13, 2007, another meeting concerning the ACS reorganization took place with representatives of OLR, ACS, and the Union. The City contends that one topic of discussion at this meeting was the transitioning of the previous titles into the new titles. The Union makes no reference in the pleadings to these meetings, but asserts that the City does not allege that they constituted bargaining, but rather informational meetings only.

The Union claims that, on or about July 18, 2007, it learned that ACS was selectively hiring employees and transferring employees into the new IOC titles at starting salaries higher than that provided for by the Agreement. The Union asserts that, in some cases, the salaries were as much as eight percent higher. The Union asserts–but the City denies–that the City provided no notice of the higher salaries and did not bargain over the basis of the additional pay or the criteria and procedures for determining which employees would receive the higher salaries.

The City admits that, on July 19, 2007, the ACS General Counsel and OLR Assistant Commissioner were in contact with the Union vice president. The City does not characterize the nature of the contact with any specificity. The Union asserts that the Union vice president objected to the higher salaries that he said ACS was paying to the 39 newly hired employees and an unspecified number of incumbent transferees over and above that for which the Agreement provided.

The Union also contends that its vice president demanded that the City meet over the issue of the higher salaries.

A meeting was held on August 2, 2007 between representatives of the Union and management. The Union asserts that its vice president again demanded negotiations before the City implemented the higher salaries and asked for information including the names of the new hires, their hiring dates, title and salary offered to each; the names of incumbents being transferred into the IOC titles, their old title, new title, old and new salaries, and effective dates of the title changes; and names of Child Evaluation Specialists, or as the Union states, "Civil Service Title being changed from Child Welfare Specialist Supervisor II to Supervisor III Social Work," who were offered an additional increase in salary other than the contractual minimum salary of the Supervisor III (Social Work) title.

The Union contends that its vice president spoke several times with the ACS general counsel, and OLR representatives during the weeks of August 6 and 13, 2007, repeating his demand for negotiation and requesting the information described above. The Union vice president spoke with the ACS general counsel on September 17, 2007, repeating demands for bargaining and information. Although the City denies the Union's assertion, it affirmatively alleges that the ACS general counsel said that ACS would continue with its plan without bargaining. The Union maintains that the information which its vice president sought was not provided at that time.

The Union acknowledges in its reply that a portion of the requested information was provided in a letter accompanying the City's responsive pleading to the instant petition but asserts that the information, requested on August 2, 2007, was thus not provided until November 16, 2007.

At a conference in this matter, the Union admitted that the documents provided on or about

November 16, 2007 were responsive to this request, with the exception that the City did not and has not provided the salaries at which the new hires and incumbents transferring to the positions at issue were appointed to their new positions. The City acknowledged that it has not provided that information.

The Union demands that the City cease and desist from paying salaries in excess of the negotiated contract rates, that it cease and desist from offering new hires and transferred employees salaries that are in excess of the negotiated contract rates, and that it provide all of the information that the Union has requested relating to salaries of the employees in the titles at issue, and that the Board direct such other relief as may be just and proper.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that ACS violated NYCCBL § 12-306(a)(4) by refusing to bargain collectively in good faith on matters within the scope of collective bargaining, namely, salaries of new hires and salaries of incumbent employees transferred into newly created titles within ACS.[3] The Union also argues that ACS has violated NYCCBL § 12-306(a)(5) by unilaterally changing the pay rates of these employees. By doing so, the Union argues that ACS has also violated NYCCBL § 12-206(a)(1) by restraining and coercing public employees in the exercise of their rights guaranteed

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[3] NYCCBL § 12-306(a)(4) provides, in pertinent part:
It shall be an improper practice for a public employer or its agents:
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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....

by § 12-305 of the NYCCBL.[4] The Union further argues that, even assuming that ACS had a right to pay salaries higher than the rates set forth in the Agreement, the City had a duty to bargain over the criteria and procedures for determining who would receive the salaries in excess of the Agreement-specified rate. Finally, the Union contends that the City has violated NYCCBL § 12-206(c)(4) by refusing the provide, in timely fashion, relevant and reasonably necessary information for purposes of collective negotiations on salaries as well as information necessary for monitoring the Agreement.[5]

City's Position

The City contends that ACS has not interfered with any independent or derivative rights of public employees in the titles at issue to meet with or assist the Union or participate in its activities as guaranteed in NYCCBL § 12-305. The City argues that ACS had no duty to bargain over the standards of selection for employment and consequent salaries of the employees at issue, so long as those salaries fell within the salary range in the Agreement. At any rate, the City asserts that its

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[4] NYCCBL § 12-305 provides, in pertinent part:
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.

[5] NYCCBL § 12-306(c) provides, in pertinent part:
The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
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(4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. . . .

representatives discussed the matter on several occasions with the Union in spite of the fact that no agreement was forthcoming. Any bargaining duty which the Board may determine ACS may have, which the City does not concede, has thus been satisfied. Finally, with respect to the claim concerning the provision of information, the City argues that the parties are not in a period of negotiating a contract and are under no obligation to produce the information. Nevertheless, the City contends that, "in the spirit of cooperation and good labor relations," it had produced certain of the information requested. At the conference on January 18, 2008, the City acknowledged that it did not provide the salary information requested, and claims that because the parties were not in a negotiation period that it was under no duty to provide any of the requested information. The City stated that it was not willing to provide the salary information absent a ruling from the Board.

DISCUSSION

Neither the claim that the City failed to bargain in good faith over the salaries of new hires and transferred employees whom the ACS allegedly paid in excess of rates previously negotiated in the Agreement nor the City's contention that it merely offered new hires and transferees salaries that were in accordance with the Agreement can be ruled upon at the present. Both the claim of failure to bargain and the assertion of a defense of statutory right and duty/satisfaction first require elucidation of the salaries at issue. That elucidation can only be achieved by production of the requested salary information which is, itself, an obligation under the NYCCBL.

The City does not dispute that the subject of wages, generally, is a mandatory subject of bargaining, nor that the instant dispute concerns wages, nor even that the new titles are successor titles to previously existing titles covered by the Agreement. Rather, the City claims that because

the salaries at issue are in accord with the Agreement, there is no duty to negotiate them, and further that there is no duty to provide the salary information which the Union has requested. We find the City's argument that it was under no duty to furnish information regarding salaries under the circumstances herein to be devoid of merit.

NYCCBL § 12-306(c)(4) explicitly provides the duty to bargain in good faith includes the obligation:

> to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

See UFA, 71 OCB 19, at 11-12 (BCB 2003); *CSTG, Local 375*, 25 OCB 41, at 10 (BCB 1980).

As we have recently had occasion to explain:

> Under NYCCBL § 12-306(c)(4) and § 12-306(a)(4), public employers and public employee organizations have a mutual obligation, as part of the duty to bargain in good faith, to furnish, upon request, "data normally maintained in the regular course [of] business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." This duty extends to information relevant to and reasonably necessary for the administration of the parties' agreements, such as processing grievances, and/or for collective negotiations on mandatory subjects of bargaining.

PBA, 79 OCB at 14 (citing cases).

Nothing in either the statutory language nor the prior decisions of this Board give credence to the claim that the duty to provide such information exists only during a negotiation period, and, in fact, the duty to provide information relevant to and necessary for the administration of a contract presupposes the existence of a contract to administer. With respect to information that is sought to determine whether conduct has occurred that could provide the basis for a claimed improper practice,

we find that the purposes underlying the statutory obligation to bargain will be better served if reasonable requests for information from which a certified representative can assess whether a management action or decision constitute an improper practice are granted. *See UFA*, 71 OCB 19, at 13. This is especially the case where, as here, the statutory policy in favor of bargaining would be frustrated by placing the burden of proof on the Union to establish to our satisfaction a unilateral change absent bargaining without the benefit of specific germane information which is acknowledged to be within the employer's possession and which would shed light on the employer's compliance with, or frustration of, the statute. *Id.*

Information relating to wages, whether in pursuit of a potential grievance or germane to a proffered defense on a charge of failure to bargain in good faith, falls within the scope of information "reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." *PBA*, 79 OCB 6, at 14 (BCB 2007), citing *DC 37*, 77 OCB 23, at 13-14 (BCB 2006); *Captains Endowment Ass'n*, 77 BCB 22, at 12-13 (BCB 2006); *see also*, *Board of Educ., City Sch. Dist. of Albany*, 6 PERB ¶ 3012 at 3030 (1973); *State of New York (Office of Mental Retardation and Developmental Disabilities)*, 38 PERB ¶ 3036 (2005).

We direct, therefore, the City to produce to the Union, within 45 days, the salary information omitted from its production of November 16, 2007–that is, the salaries paid all new hires and/or transferred employees into the titles at issue herein. We hold in abeyance any further proceedings in this matter pending receipt of the information, and a reasonable time to evaluate its impact on the claims herein. We further direct the parties to contact the Trial Examiner within 30 days after the City's delivery of the information to schedule a further conference as to what further proceedings,

if any, are warranted with respect to the remaining claims in this matter.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, Docket No. BCB-2653-07, filed by Social Service Employees Union, Local 371, District Council 37, against the New York City Administration for Children's Services, be, and the same hereby is, granted in part, and it is further

ORDERED, that the City produce, within forty-five (45) days of the date of this Order, the salary information pertaining to all new hires and/or transferred employees into the titles at issue herein; and it is further

ORDERED, that the parties contact the Trial Examiner within thirty (30) days of the production of the information referenced above to schedule a conference to determine what further proceedings, if any, are appropriate prior to a final decision in this matter; and it is further

ORDERED, that a determination with respect to the remaining issues in this case be held in abeyance pending compliance with the provisions of this Order.

Dated: March 3, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

Note: City Member M. David Zurndorfer recused himself and did not participate in the decision in this case.