CWA, Local 1180, 1 OCB2d 2 (BCB 2008)

(IP) (Docket No. BCB-2211-01).

***Summary of Decision*:** The Union alleges that the City violated NYCCBL § 12-306(a)(4) by refusing to bargain over the creation of a new title series which the Union claims was substantially similar to the PAA title. The Union further alleges that the City's conduct constitutes unilateral changes in mandatory subjects of bargaining in violation of NYCCBL § 12-306(a)(5). This Board has previously found that the new title series was substantially different from the PAA title. Therefore, the Board finds that the City has not violated NYCCBL § 12-306(a)(4) or (5). **(*Official decision follows*).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 1180, COMMUNICATION WORKERS OF AMERICA,

Petitioner,

-and-

THE CITY OF NEW YORK AND
THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Respondents.

DECISION AND ORDER

On May 15, 2001, Local 1180 of the Communication Workers of America ("Union" or "Local 1180") filed a verified improper practice petition on behalf of its members alleging that the City of New York ("City") and the New York City Human Resources Administration ("HRA") violated Section 12-306(a)(4) and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it restructured the HRA. As part of the restructuring, the City created a new title series, the Job Opportunity Specialist ("JOS"), which

the Union alleges is substantially similar to the Principal Administrative Associate ("PAA") title series. The Union argues that, because the two title series are so similar, the City was obligated to bargain with it over the creation of the JOS title series and that its creation was a unilateral change in a mandatory subject of bargaining. The City argues that the creation of a new title series and the reclassification of an existing position are managerial rights. Further, the City argues that the Union's claims sound in contract, not statute, and therefore the Board lacks jurisdiction to hear them. The Board finds that the JOS title series and the PAA title series are not substantially similar and therefore deny the improper practice petition.

BACKGROUND

This is the eighth case to come before this Board or the Board of Certification ("BOC") stemming from the creation of the JOS title series. The restructuring of the HRA and the creation of the JOS title series are described in greater depth in *Local 1180*, *CWA,* 79 OCB 35 (BCB 2007), and *Local 371, SSEU*, 76 OCB 1 (BOC 2005).[1]

In brief, in response to changes in federal and state welfare laws, the City restructured the HRA by creating Job Centers and a new title series to staff them, the JOS title series. The JOS title series was designed to assist clients from their initial encounter with the HRA through their removal from the welfare rolls. The title series consists of the JOS title, the Associate Job Opportunity

[1] The facts presented herein are drawn not only from the pleadings in the instant matter but also from the seven prior Board and BOC decisions already issued regarding the JOS title series, of which this Board takes administrative notice. *See Local 1180*, *CWA,* 79 OCB 35; *CWA, Local 1180*, 76 OCB 4 (BOC 2005); *Local 371, SSEU*, 76 OCB 2 (BOC 2005); *Local 371, SSEU*, 76 OCB 1; *DC 37*, 71 OCB 20 (BCB 2003); *Local 1180*, *CWA,* 69 OCB 28 (BCB 2002); *DC 37*, 69 OCB 23 (BCB 2002); and *Local 371, SSEU*, 68 OCB 11 (BOC 2001).

Specialist ("AJOS") title, and the Administrative Job Opportunity Specialist title, but only the AJOS title is at issue in this case.

Prior to the restructuring at HRA, its clients would see workers in four separate title series – PAA, Eligibility Specialist ("ES"), Caseworker ("CW"), and Supervisor [Welfare] ("SUP"). Local 1180 represents PAAs, while Local 371 of the Social Service Employees Union ("SSEU Local 371") represents CWs and SUPs, and Local 1549 of District Council 37 ("DC 37 Local 1549") represents ESs (collectively, the "Unions"). While none of these titles have been eliminated, the JOS title series incorporates areas of responsibility from these positions into one title series. The net result of the reorganization at the HRA was that employees from four titles (PAA, ES, CW, and SUP), represented by three bargaining representatives (Local 1180, SSEU Local 371, and DC 37 Local 1549), were moved into two titles (JOS and AJOS).

In October 2000, the City began meeting with the Unions to discuss the planned JOS title series. The City and Local 1180 were parties to a collective bargaining agreement known as the PAA Contract, which applied to the PAA titles at the HRA.[2] According to Local 1180, it informed the City at a December 11, 2000, meeting with the Unions that the AJOS title was so similar to the PAA title that the City was obligated to fill the AJOS title with PAA incumbents pursuant to the PAA Contract.

All three Unions separately filed Petitions for Certification with the BOC pursuant to Section 1-02© of the Rules of the Office of Collective Bargaining (Rules of the City of New

[2] At the time the instant petition was filed, the PAA Contract, having expired March 31, 2000, remained in effect pursuant to the *status quo* provision of NYCCBL § 12-311(d). A successor PAA Contract was subsequently ratified to cover the period April 1, 2000, through June 30, 2002. There are no salient differences between the two PAA Contracts.

York, Title 61, Chapter 1), requesting to amend their Certifications in response to the creation of the new title series. Local 1180 sought to amend its Certification No. 41-73, which covered PAAs, among other titles, to include the AJOS title. SSEU Local 371 sought to represent the JOS and AJOS titles; DC 37 Local 1549 sought to represent the JOS title. The BOC consolidated the three petitions. *Local 371, SSEU*, 68 OCB 11.[3]

On March 30, 2001, Local 1180 filed a Request for Arbitration ("RFA") with the Board stating that the grievance to be arbitrated was the "Elimination of the PAA title" and that the contract provisions alleged to be violated were "Article X[,] Appendix C & Article VI of the grievance procedure in the PAA contract." The relief requested was to "[s]top the reclassification of 600 CWA jobs which will [r]eplace other job titles."[4]

Appendix C is entitled "Separation of Income Support from Social Service in the Department of Social Services" and reads, in pertinent part:

> In an Income Support unit resultant from the separation of functions described hereinabove, any vacancy for which job duties have remained substantially unchanged, which was formally held by an employee in the Principal Administrative Associate or predecessor title and which the Employer decides to fill shall be filled by an Employee in the Principal Administrative Associate or predecessor title.

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[3] The City agreed that during the pendency of the certification petitions, current employees moving into the JOS and AJOS titles would continue to be represented by the union that represented them prior to their transfer and would receive all the benefits of their respective collective bargaining agreements. *DC 37*, 69 OCB 23, at 3.

[4] On January 25, 2001, Local 1180 had filed a Step III grievance alleging that the creation of the JOS title series violates Appendix C of the PAA Contract. The grievance did not go through Steps I or II, as grievances claiming a contract violation effecting a large number of employees may be filed directly at Step III pursuant to Article VI, § 8, of the PAA Contract. On February 23, 2001, the grievance was amended to include a violation of Article X, § 2, of the PAA Contract. In response to the filing of the RFA, the Office of Labor Relations closed the grievance on April 27, 2001, without having held any hearings or issuing a Step III determination.

Article X is entitled "Transfer and Reassignment File" and Section 2 thereof reads, in pertinent part:

> Prior to filling through promotion, appointment or reassignment, vacant positions in the titles of Principal Administrative Associate, . . . , or any title represented by Local 1180 which has assignment levels, the agency shall consult its Transfer and Reassignment Request File and give due consideration for transfer or reassignment to all qualified applicants, including their seniority, whose request are contained in said file. To the extent practicable, the Agency agrees that workers to be involuntarily transferred shall receive five (5) days advance notice.

Article VI is entitled "Grievance Procedure" and defines a grievance as "[a] dispute concerning the application or interpretation of the terms of this Agreement."

The City began filling positions in the JOS titles series in May 2001 and on May 15, 2001, Local 1180 filed the instant improper practice petition, which refers to the same contract provisions as the RFA.[5]

On January 3, 2005, the BOC concluding that the JOS and AJOS titles would be appropriately placed in any of the bargaining units and ordered that two elections be held between the competing Unions to determine which union would represent the JOS title and which union would represent the AJOS title. *Local 371, SSEU*, 76 OCB 1. Both elections were won by SSEU Local 371, which was certified to represent the JOS and AJOS titles on April 27, 2005. *Id.* On October 25, 2007, the Board denied the Union's RFA. *Local 1180*, *CWA*, 79 OCB 35.

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[5] Incumbents in the PAA and SUP titles were asked to voluntarily convert to the new AJOS title. At the same time, incumbents in the ES and CW titles were asked to voluntarily convert to the new JOS title, but the JOS title is not at issue in the instant petition. Employees from outside of the PAA and SUP titles were also hired into the AJOS title. As of March 2002, approximately 52% of the employees who converted to the AJOS title formerly held the PAA title. *Local 371, SSEU*, 76 OCB 1, at 3. As of October 2003, at the Job Centers there were 655 employees in the AJOS title, 163 in the PAA title, and 103 in the SUP title. *Id.* The PAA and SUP titles continued to be used at the HRA as of January 2005. *Id.*

POSITIONS OF THE PARTIES

Union's Position

The Union puts forth twelve claims, six pursuant to NYCCBL § 12-306(a)(4) and six pursuant to NYCCBL § 12-306(a)(5). For each alleged NYCCBL § 12-306(a)(4) violation, there is a parallel claimed NYCCBL § 12-306(a)(5) violation. The claims are as follows:

First, Local 1180 claims that the AJOS job duties are substantially similar to the PAA job duties and therefore the City violated NYCCBL § 12-306(a)(4) by not negotiating with the Union over the transferring of unit work out of the bargaining unit, which it argues is a mandatory subject of bargaining. The Union further argues that, should the Board find that the duties of the AJOS and PAA titles were not substantially similar, such would only be one factor to be considered in a balancing test when evaluating whether the transferring of unit work out of the bargaining unit is a mandatory subject of bargaining. The Union's interest outweighs the City's, since the City lacks a compelling reason to transfer work out of the bargaining unit, while Union members would suffer many harms from such transfers, including loss of unit bargaining strength, an additional probationary period, limits on advancement, employee displacement, reduced transfer opportunities and denial of contractually guaranteed transfer considerations. Therefore, the City must bargain with the Union. An additional factor, the Union argues, is that the restructuring as described arguably violates Section 5.3.2(a) of the Personnel Rules and Regulations of the City of New York ("Personnel Rules"), which prohibit a person transferring to a position that tests for higher qualifications than the position held by the person.[6] The JOS title series is broadbanded; that is, it

[6] Personnel Rules § 5.3.2(a) provides:

includes several levels within each title (ex. AJOS I, II, and III). According to the Union, SUPs, who will compete with PAAs for the AJOS positions, will inevitable be promoted to AJOS II and III positions without having taken the necessary competitive exams, thereby violating the Personnel Rules. The Union's seventh claim is that the transferring of unit work out of the bargaining unit also constitutes a unilateral change in violation of NYCCBL § 12-306(a)(5).

Next, the Union argues that, since the AJOS position is substantially unchanged from the PAA position, the City "violated NYCCBL § 12-306(a)(4) by falsely 'reclassifying' PAAs as AJOSs, and failing to bargain over imposing a six-month long probationary period on PAAs who become AJOSs. Probationary periods are mandatory subjects of bargaining." (Pet. ¶ 31). The City used this pretextual reclassification to circumvent its bargaining obligations and thereby violated NYCCBL § 12-306(a)(4). The Union's eighth claim is that the reclassification also constitutes a unilateral change in violation of NYCCBL § 12-306(a)(5).

The Union then argues that, since the AJOS position is substantially unchanged from the PAA position, the City's refusal to bargain over the filling of the AJOS position violates Appendix C of the PAA Contract and is therefore a violation of NYCCBL § 12-306(a)(4). The Union's ninth claim is that this also constitutes a unilateral change in violation of NYCCBL § 12-306(a)(5). Although contract violations are stated, the Union argues that the Board has jurisdiction because

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> No promotion shall be made from one position or title to another position or title unless specifically authorized by the commissioner or citywide administrative services, nor shall a person be promoted to a position or title for which there is required an examination involving essential tests or qualifications different from or higher than those required for the position or title by such person unless such person has passed the examination and is eligible for appointment to such higher position or title.

improper practices are also alleged.

The remaining claims are that, since the AJOS position is substantially unchanged from the PAA position, the City's restructuring is in violation of the transfer provisions contained in Article X of the PAA contract, and the refusal to bargain over it thereby violates NYCCBL § 12-306(a)(4). The fourth claim argues that since the City plans to give priority in transfers to PAAs displaced by the restructuring, it will be in violation of the Transfer and Reassignment File provision of Article X. The fifth claim argues that the City will be violating the emergency transfer provision of Article X, which addresses involuntary transfers, stating that they should be on an emergency basis only and, when possible, not for more than 30 days. The sixth claim argues that because of the similarity in duties, the AJOS should be part of the PAA position, and, therefore, transfers must be done pursuant to Article X. The tenth, eleventh, and twelfth claims argue that transfers in violation of Article X constitute unilateral changes in violation of NYCCBL § 12-306(a)(5). The Union argues that this Board has jurisdiction because these contract violations are also improper practices.

The Union argues the managerial rights provision of NYCCBL § 12-307(b) does not insulate the City from the violations of the NYCCBL stated in the instant petition, specifically "transferring bargaining unit work out of the PAA title and into the AJOS title, in falsely reclassifying PAAs at Job Centers as AJOS employees, and in unilaterally changing contractual terms." (Rep. ¶ 32).[7]

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[7] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services offered by its agencies; determine the standards of selection for employment; direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; . . . and exercise complete control and discretion over its organization

City's Position

The City argues that none of the matters cited by the Union are mandatory subjects of bargaining. The creation of the JOS title series cannot give rise to violations of NYCCBL § 12-306(a)(4) and (5) because Board precedent has long established that the content of job classifications is a management right, "i.e., job specifications are not mandatory." (Ans. ¶ 103). The City further asserts it is also well settled that the creation of new positions is a management right.

The City argues that the creation of the JOS title series falls within its statutory right to create titles pursuant to NYCCBL § 12-307(b). Nothing in the contract provisions cited by Local 1180 waives or modifies the City's managerial rights. A reclassification properly undertaken pursuant to the City's managerial right is not an improper practice even if the reclassification results in the reduction of a particular union's membership.

The City further argues the Board lacks jurisdiction over the alleged contract violations. The Union's claims all stem from alleged contract violations, and therefore the Union "has failed to state a claim pursuant to § 12-306." (Ans. ¶ 114). The City notes that the Union has filed a grievance related to theses claims and that "[a]n improper practice proceeding filed as an alternative to arbitration by the Union is not an appropriate forum." (Ans. ¶ 116). Similarly, to the extent that the Union is alleging that the classification of the JOS title series is improper, "that question is not within the Board's jurisdiction." (Ans. ¶ 153). To the extent that any such challenge to the JOS classification is made under the NYCCBL, the classification falls within the ambit of a managerial right pursuant to NYCCBL § 12-307(b). To the extent it is made under any other law, this Board

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and the technology of performing its work.

lacks the jurisdiction to hear it.

DISCUSSION

Eleven of the twelve claims pressed by Local 1180 rely upon the argument that the AJOS title is not a new title at all, but merely a reclassification of the PAA title, and only part of the remaining claim stands independent of that argument. This Board recently addressed the issue of similarity of duties of the AJOS and PAA titles, and the BOC's analysis thereof, in *Local 1180*, *CWA,* 79 OCB 35, in which this Board stated:

> However, the issue of similarity of duties has already been fully litigated by these parties and necessarily determined in another administrative proceeding. In *Local 371, Social Services Employees Union*, [76 OCB 1 (BOC 2005)], the BOC was required to make an in-depth analysis of the JOS title series and all the titles effected by its creation. . . . Local 1180 argued that "the AJOS title shares the same community of interest with PAAs because both titles perform the same basic duties and share the same job description." *Id.* at 17. The BOC concluded that the new JOS and AJOS position contained tasks from the PAA, ES, CW, and SUP titles and that:
>
> > The use of two titles, instead of four, has expanded the range of duties for employees in the new titles. Therefore, the typical tasks listed in the JOS and AJOS job specifications are more numerous and broader than the tasks listed in either the ES, Caseworker, SUP or PAA job specifications.
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> *Id.* at 27. . . . In other words, the BOC determined that the AJOS title was a new title and not merely a renaming of the PAA title.

Id. at 11-12 (footnote omitted). The Board went on to accept the BOC's findings, noting that:

> Local 1180 was a party to that BOC proceeding, had a full and fair opportunity to litigate the issue of the similarity (or dissimilarity) of job duties, and had the opportunity to appeal, but chose not to, the determination by the BOC that was adverse to Local 1180's position, there is no basis for this Board to find otherwise.

Id. at 12.

This Board finds no reason to vary from its earlier adoption of the BOC determination that the AJOS position is a new position and not a pretextual reclassification of the PAA title. Accordingly, we find that the Union has failed to substantiate claims two through twelve, which would require us to draw the opposite conclusion. That is, claims two through twelve each allege and are dependent upon the contention that the AJOS title is merely the PAA title renamed. As the BOC found differently, and Local 1180 neither appealed that adverse finding, nor has presented any reason for us to vary from that finding, this Board holds that the AJOS position constitutes a new position, not a re-titling of the PAA position. Accordingly, we find that claims two through twelve are unsubstantiated. To the extent the first claim is also reliant upon a finding that the AJOS and PAA titles are substantially similar, it too is found to be unsubstantiated.

The first claim, however, is pleaded in the alternative, asserting that the transferring of unit work out of the bargaining unit constitutes a mandatory subject of bargaining independently of whether or not the AJOS position is substantially similar to the PAA position. This Board analyzed transferring of unit work in *CWA, Local 1180*, 43 OCB 47 (BCB 1989), and more recently in *IUOE, Locals 15 & 14*, 77 OCB 2 (BCB 2006). In the later case, the Board held:

> Generally, management has the right to determine the methods, means and personnel by which government operations are to be conducted. This Board has stated that management is limited from exercising this right if it has so agreed in a contract provision, if a statutory provision prevents such unilateral exercise, or if a party makes a showing that the work belongs exclusively to the bargaining unit.

IUOE, Locals 15 & 14, 77 OCB 2, at 12 (quotation marks and citations omitted); *see also USA, Local 831*, 39 OCB 6, at 10 (BCB 1987); *PBA*, 25 OCB 5, at 8 (BCB 1980). In the instant case, the Union has failed to demonstrate that the work at issue, the duties of an AJOS position, belonged exclusively to its bargaining unit.

The Union requests that this Board follow precedent of the Public Employment Relations Board ("PERB"), as this Board "has barely dealt with the issue of transferring unit work out of a bargaining unit." (Petitioner's Memorandum of Law, p.23, n. 20). While PERB's caselaw may not be controlling, this Board does look to that body of law for guidance when appropriate. We previously reviewed the relevant PERB opinions regarding transfer of unit work in *CWA, Local 1180*, 43 OCB 47, and in *IUOE, Locals 15 & 14*, 77 OCB 2. In its seminal case on the topic, *Niagara Frontier Transp. Auth.*, 18 PERB ¶ 3084 (1985), PERB held that:

> With respect to the unilateral transfer of unit work, the initial essential questions are whether the work had been performed by unit employees exclusively and whether the reassigned tasks are substantially similar to those performed by unit employees. If both these questions are answered in the affirmative, there has been a violation of § 209-a.1(d), unless the qualifications for the job have been changed significantly. Absent such a change, the loss of unit work to the group is sufficient detriment for the finding of a violation. If, however, there has been a significant change in the job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other.

Id. (footnote omitted).

In the instant case, assuming the applicability of the *Niagara Frontier Transp. Auth.* standard, we find that the Union has not satisfied that standard. The Board's adoption of the BOC determination that the AJOS is not merely a renaming of the PAA position results in the initial two questions posed by *Niagara Frontier Transp. Auth.* being answered in the negative. That is, the work of the AJOS position had not been performed exclusively by unit employees, and some of the reassigned tasks are not substantially similar to those performed by unit employees. Therefore, there is no mandatory duty to bargain. *See also CWA, Local 1180*, 43 OCB 47, at 13.

The Union argues, however, that PERB case law supports a balancing test as to whether the

transfer of work out of a bargaining unit may be a mandatory subject of bargaining even if the work is transferred to a job with significantly different qualifications. For this proposition, the Union relies upon *Hewlett-Woodmere Faculty Ass'n*, 28 PERB ¶ 3039 (1995), *aff'd sub nom.,* 232 A.D.2d 560 (2nd Dept. 1996), in which PERB found that:

> A change in job qualifications, however, does not necessarily exempt the employer from a duty to negotiate the transfer of exclusive unit work. The change in qualifications is at best a factor to be balanced with all other relevant factors in making the negotiability determination.

Id. at *3. The Union's reading of *Hewlett-Woodmere Faculty Ass'n* is overbroad. That case turned on the finding that, while the job qualifications had changed, the actual job performed by the positions involved were largely identical:

> There is undeniably a significant difference between the types of duties the incumbents of the two positions could potentially perform, but not between the duties actually rendered by them; and it is the latter, not the former, which controls the negotiability analysis under our decisions.

Id. at **4-5. It was upon this ground that the Second Department affirmed:

> There was ample evidence in the record establishing that the actual duties performed by the civil service Librarians were substantially similar to the actual duties which had exclusively been performed by the Media Specialists.

Hewlett-Woodmere Faculty Ass'n v. New York State Pub. Employment Relations Bd., 232 A.D.2d 560, 560 (2nd Dept. 1996).

Thus, in the only case cited by the Union to establish its claim that a balancing test should be employed when job qualifications have been significantly changed, the actual duties performed had not changed. *Hewlett-Woodmere Faculty Ass'n* indicates that PERB will look to the job as it is actually performed at the time work is transferred, as opposed to how it is described or may be performed in the future, in determining if the transfer is a mandatory subject of bargaining; however,

it does not eliminate the first two questions posed by *Niagara Frontier Transp. Auth.* In *CWA, Local 1180*, 43 OCB 47, this Board found that the:

> dispositive common element in each of [PERB's] cases is the fact that each involved a situation in which a public employer abolished bargaining unit positions and created substantially similar positions in their stead outside the bargaining unit.

Id. at 14.

In the instant case, the BOC found that employees in the AJOS position actually performed functions different from those performed by PAAs; specifically, duties that were performed by SUPs:

> The AJOSs Level I and II perform the duties previously performed by SUPs Level I and II in the Fair Hearings and Conciliations unit. . . . AJOSs now perform duties formerly performed by SUPs and oversee all subordinate employees.

Local 371, SSEU, 76 OCB 1, at 14-15. Therefore, under PERB's precedents, as well as our own, the transfer of work from PAAs to AJOSs is not a mandatory subject of bargaining. Accordingly, this Board finds that the Union has failed to plead a viable claim in its first claim as well, and we deny the improper practice petition in its entirety.

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, filed by Local 1180 of the Communication Workers of America, docketed as BCB-2211-01, and the same hereby is denied.

Dated: January 23, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER