# *SSEU, Local 371,* 1 OCB2d 20 (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 after initially refusing to provide information concerning the salaries paid the new hires and/or transferred employees, complied with the Board's finding that the City had a duty to provide the information. The Board held that the petition fails to state a cause of action pursuant to the NYCCBL but rather seeks enforcement of contractual rights, which can only be pursued through arbitration, and dismissed the petition. ***(Official decision follows.)***

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**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.***

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## 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 for the period of July 1, 2005, to June 30, 2008, ratified on March 9, 2007, ("Unit 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.[1] In an Interim Decision, the Board directed the City to provide the information sought by the Union and the City complied. The Board reserved decision as to the charges of failure to bargain charge and restraint and coercion.

On the merits of the improper practice charge, the City contends that it lawfully exercised its statutory right to determine standards for selection for employment and consequent salaries within the contractually agreed salary range. The City further asserts that it had no duty to bargain over the salary rates which were ratified by the Union in the Unit Agreement but that ACS met voluntarily with the Union to discuss the Union's concerns. Further, the City argues that there was no interference with statutory rights of ACS employees. Because the matter is governed by the Unit Agreement between the parties, we find that this Board lacks jurisdiction to resolve the issues raised in the petition, and accordingly dismiss the petition without prejudice.

## 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. In March 2006, under a mayoral directive

[1] This is apart from a Citywide Economic Agreement for the period from July 1, 2005 to March 2, 2008, which is not at issue here.

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, entitled "Improved Outcomes for Children" or "IOC," included a program to improve the oversight of work done on behalf of the City by private agencies. City workers involved in this oversight function are employed in several titles that are at issue in this case: Community Coordinator, Supervisor II (Social Work), Supervisor III (Social Work), Supervisor II (Welfare), and Supervisor III (Welfare).[2]

Although the parties agree that the Unit Agreement provides the salaries governing the "new hires," meaning employees hired from outside the agency, as well as for employees transferred from other titles within the agency, known as "Incumbent Employees," they disagree as to what that Unit Agreement provides. (Pet. at ¶ 4). The Union asserts that Article III of the Unit Agreement provides for a "Hiring Rate" for the titles at issue, meaning that rate applicable to all new hires in the specified title, absent certain specifically delineated exceptions, and that, similarly, the term "Incumbent Rate" specifies the rate Incumbents are to be paid, unless their prior salary was higher, in which case their prior rate would apply. (*Id*).

The City, by contrast, asserts that the salary provisions at issue create a range with the Hiring Rate and Incumbent Rate representing the floor of the range for each category and the maximum salary for each title representing the respective ceiling of the ranges for each category. The City further asserts it is within its rights to assign salaries "as long as those salaries chosen fall within the

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[2] The Union refers to the titles Supervisor II (Social Services) and Supervisor III (Social Services) but the Unit Agreement contains no such reference. The Unit Agreement does, however, refer to Supervisor II (Welfare) and Supervisor III (Welfare). The City generally denies the Union's assertion that the titles Supervisor II (Social Services) and Supervisor III (Social Services) are used in the Unit Agreement but the City offers no other wording. We, thus, infer the Union to intend its use of the titles Supervisor II (Social Services) and Supervisor III (Social Services) to denote Supervisor II (Welfare) and Supervisor III (Welfare) respectively, and we refer herein to the latter.

contractually agreed to salary range." (Ans. ¶ 42; *see also id.* at ¶ 23).

The Unit Agreement, effective February 1, 2007, provides for salaries for the relevant titles, replicated as follows:

| | i. minimum (1) Hiring Rate | (2) Incumbent Rate | ii. maximum |
|---|---|---|---|
| Community Coordinator | $42,173 | $48,499 | $65,468 |
| Supervisor II (Social Work) | $51,794 | $59,563 | $71,120 |
| Supervisor III (Social Work) | $56,929 | $65,468 | $76,773 |
| Supervisor II (Welfare) | $46,877 | $53,908 | $71,120 |
| Supervisor III (Welfare) | $51,794 | $59,563 | $76,773 |

The Unit Agreement contains footnotes to the Supervisor II and Supervisor III titles to the effect that each appointment to these positions "above the hiring rate will be handled on a case by case basis." (*Id.*).

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

acknowledges that the City asserts that these meetings were merely informational and did not constitute bargaining.

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 Unit Agreement. The Union asserts that, in some cases, the salaries were as much as eight percent higher than the starting salaries. The Union asserts–but the City denies–that the City provided no notice of its decision to pay 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 asserts, on the one hand, that through the meetings that were held at this time and over the next several weeks, it engaged in bargaining and, on the other hand, that the meetings were not bargaining as such. (Answer ¶ 45; ¶ 37, 50).

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 this contact with any specificity. The Union asserts that the Union vice president objected to the higher salaries that 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. Upon the issuance of 1 OCB2d 11 (BCB 2008) on March 3, 2008, the City was directed to and, on March 28, 2008, did comply with the Board's directive to supply all of the requested information. The parties do not dispute that the titles affected herein all existed prior to the creation of IOC and that they are subject to the duty to bargain. Indeed, each party alludes to the Unit Agreement to establish its case.

In a letter dated May 1, 2008, following a conference on April 30, 2008, the Trial Examiner memorialized the representations by counsel for both parties that neither party claims that a material issue of disputed fact requires an evidentiary hearing in this case; moreover, the parties further stipulated that each of the claims and defenses that have been raised are asserted to be based upon rights created by the New York City Collective Bargaining Law and not based upon contractual interpretation. The letter further reiterated that neither party has asserted that deferral to arbitral interpretation of the Unit Agreement is warranted in this matter and, in fact, both parties mutually

have requested that, since attempts to resolve this matter have proven fruitless to date, the Board issue a final determination at this time.

The Union reiterates its demand that the City cease and desist from paying salaries that are 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 the Board direct such other relief as may be just and proper.[3]

## 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.[4] 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

[3] The Union's claim concerning the provision of information and the City's defenses to it have been adjudicated by the Board's decision in 1 OCB2d 11 (BCB 2008) and are not further addressed in this final determination.

[4] 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.[5] 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, by refusing to provide in timely fashion the relevant and reasonably necessary information sought for purposes of collective negotiations on salaries as well as information necessary for monitoring the Agreement, the City violated NYCCBL § 12-206(c)(4).[6]

**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 to 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 representatives discussed the matter on several occasions with the Union in spite of the fact

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[5] 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.

[6] 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. . . .

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.

## DISCUSSION

In this case, the Union claims that the City has breached its duty to bargain over the salaries of employees in the titles of Community Coordinator, Supervisor II (Social Work), Supervisor III (Social Work), Supervisor II (Welfare), and Supervisor III (Welfare), who have been hired under ACS's IOC plan, while the City claims it has fulfilled that duty.

As we have recently had occasion to reaffirm, "NYCCBL § 12-307(a) provides that public employers and certified or designated employee organizations have a duty to bargain in good faith on matters within the scope of collective bargaining. These matters include wages, hours, and working conditions and are mandatory subjects of bargaining." *UFOA*, 1 OCB2d 17, at 9-10 (BCB 2008), citing *PBA,* 79 OCB 43, at 7 (BCB 2007); *D.C.37*, 75 OCB 10, at 7 (BCB 2005). Moreover, under NYCCBL § 12-306(a)(1) and (4), it is an improper practice for a public employer to refuse to bargain in good faith on mandatory subjects of bargaining. *Id.* at 10.

To prove a claim sounding in an employer's refusal to bargain in good faith resulting in a unilateral change to a term or condition of employment, the Union must establish first that the matter sought to be negotiated is a mandatory subject of bargaining. *See, e.g., UFOA*, 1 OCB2d 17 at 10; citing *DC 37,* 75 OCB 14, at 12 (BCB 2005); *SSEU*, 69 OCB 10, at 4 (BCB 2002); *see also Doctors Council,* 67 OCB 27, at 7 (BCB 2001); *DeMelia*, 25 OCB 14, at 5 (BCB 1980). The petitioner further must "demonstrate the existence of such a change from the existing policy or practice." *UFOA*, 1 OCB2d 17, at 10.; *see also PBA*, 73 OCB 12, at 17 (BCB 2004); *SSEU*, 69 OCB 10 (BCB

2002); *Town of Stony Point*, 26 PERB ¶ 4650 (1993). Only upon a showing of all three elements will the Board find that an improper practice has occurred.. *See DC 37,* 75 OCB 14, at 13 (BCB 2005); *Local 1182,CWA,* 67 OCB 26, at 4 (BCB 2001); *PBA*, 63 OCB 4, at 10 (BCB 1999).

It is axiomatic that wages constitute perhaps the quintessential mandatory subject of bargaining. *UFOA*, 1 OCB2d 17, at 9-10 (citing cases); *Bellmore Union Free Sch. Dist.*, 34 PERB ¶ 3009 at 3017 (2001); *see also*, Lefkowitz, ed., *Public Sector Labor Law* 3d Ed. (2008) at 612 ("At this stage of Taylor Law development, no citation is required to support the statement that salary levels . . . are a mandatory subject of bargaining"). The parties do not dispute that the titles affected herein all existed prior to the creation of IOC and that they are subject to the duty to bargain. Indeed, each party looks to the Unit Agreement to establish its case.

The parties agree that the Unit Agreement provides for the salaries governing the "new hires," meaning employees hired from outside the agency, as well as employees transferred from other titles within the agency, known as "Incumbent Employees," but the parties disagree as to what that Agreement means with respect to the salary figures set forth therein. (Pet. at ¶ 4). The Union asserts that Article III provides for a specific "Hiring Rate" for the titles at issue, meaning the one rate that applies to all new hires in the specified titles, with certain specifically delineated exceptions, and that, similarly, the term "Incumbent Rate" specifies the sole rate Incumbents are to be paid, unless their prior salary was higher, in which case their prior rate would apply. (*Id*). The City, by contrast, asserts that the salary provisions at issue create a range and that the Hiring Rate and the Incumbent Rate represent minimum salaries below which the employer cannot pay the employees to which each rate is applicable and, further, that the maximum salary for each title forms the top of a range within which it is within its rights to assign salaries "as long as those salaries chosen fall

within the contractually agreed to salary range." (Ans. ¶ 42; *see also id.* at ¶ 23).

In short, both parties agree that the Unit Agreement provides for the salaries to be paid to the New Hire and Incumbent employees hired in the affected titles, but they disagree over whether the Unit Agreement provides mandated starting salaries or a salary range. Thus, as we have previously recognized, "a union and an employer may satisfy by agreement their mutual duty to bargain a given subject, and thereby waive any further bargaining rights regarding the exercise of that contract right." UFOA, 1 OCB2d 17, at 14-15, citing *Antoine*, 73 OCB 8, at 11-12 (BCB 2004); *Doctors Council*, 69 OCB 24, at 7 (BCB 2002); *County of Livingston*, 26 PERB ¶ 3074 (1993); see also, *DC 37*, 75 OCB 10, at 10 (BCB 2005) (describing "contract waiver" or "duty satisfaction" defense; citing *County of Nassau*, 31 PERB ¶ 3074 (1998); *Maine-Endwell Central School District*, 14 PERB ¶ 4625 (1981), *aff'd,* 15 PERB ¶ 3025 (1982)). In this circumstances presented here, the City's defense, that such an agreement precludes a finding of failure to bargain, is meritorious, as both parties assert that they have negotiated this subject and that their agreement controls, while disagreeing on its meaning. *id.*

The Union's citation to *Bellmore Union Free Sch. Dist.*, 34 PERB ¶ 3009 (2001), does not negate the applicability of the contract waiver or "duty-satisfaction" defense to this case. In *Bellmore Union Free Sch. Dist.*, PERB noted that the doctrine could not apply where "[it] is undisputed that the parties' collective bargaining agreement does not specify a hiring rate or a salary step for newly hired employees" at issue in the case. *Id.* at 3017. Nor do the other cases relied upon by the Union establish any applicable exception to the defense. *See Bd. of Educ., City Sch. Dist. City of New York*, 22 PERB ¶ 3011 at 3029 (1989) (defense of "contract waiver" inapplicable where waived through failure to plead); *Churchville-Chili Cent. Sch. Dist.* 17 PERB ¶ 3055 at 3085 (1984)

( unilateral creation of two positions without negotiation not an improper practice).

Although the parties dress their arguments in statutory garb, the Union asserts, and the City denies, that the City is disregarding the clear import of the provisions of the Unit Agreement applicable to these titles. As we have previously noted, this Board will look beyond statutory citations to the essence of the claims asserted in resolving improper practice claims. *Seale*, 79 OCB 30, at 7 (BCB 2007), citing *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004). In essence, the parties seek to have this Board construe the Unit Agreement to determine if the City's conduct constitutes a breach thereof, and thus, it is argued, a violation of the NYCCBL. However, this Board, like the Public Employment Relations Board, must comply with Civil Service Law § 205.5(d), which states in pertinent part:

> . . . the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

*DC 37*, 79 OCB 11, at 9-10; *see also City Employees Union, Local, 237, I.B.T.*, Decision No. B-24-2006 at 15. Alleged violations of an agreement between the employer and an employee organization that do not otherwise constitute improper practices are expressly beyond the jurisdiction of this Board. *DC* 37, 79 OCB 11, at 10; citing *Local 237, International Brotherhood of Teamsters*, Decision No. B-31-1998. Alleged contractual violations may not be rectified through the filing of improper practice charges. *Id*.; citing *Local 1182, Communications Workers of America,* B-11-2003 at 4; *Local 237, Int'l Bhd. of Teamsters*, Decision No. B-31-1998 at 7; *Local 1182, Communications Workers of America,* Decision No. B-8-96 at 11.

This determination, of course, is without prejudice to the Union's right to pursue its claims in arbitration. *See, e.g., CEA*, 79 OCB 39, at 17 (BCB 2007). We expect that the City's provision

of the requested salary information on March 28, 2008 as required by our interim decision to enable the Union to assess whether in fact any violation of the applicable agreements has taken place, and to file any such claim in a timely manner.

Because no violation of the NYCCBL has been established, the petition is dismissed 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, 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, dismissed in its entirety.

Dated: June 9, 2008
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER