DC 37, L. 1322, 1 OCB 2d 4 (BCB 2008)

(IP) (Docket No. BCB-2574-06).

Summary of Decision*:* The Union alleges that DEP disciplined two employees in retaliation for the exercise of their rights under the NYCCBL. The City moved to defer the Union's improper practice petition to arbitration on the grounds that the collective bargaining agreement is the basis for the alleged statutory violation and that the issues to be arbitrated are identical with those in the petition. The Board finds that it would be inappropriate to defer the improper practice claims and, therefore, denies the City's motion. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, LOCAL 1322,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

INTERIM DECISION AND ORDER

On October 6, 2006, District Council 37, AFSCME, and its affiliate, Local 1322, ("Union") filed an improper practice petition against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP"). The Union alleges that DEP violated § 12-306(a)(1) and (a)(3) of the New York City Collective Bargaining Law (New York City

Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it disciplined two supervisory employees, Jack Schmidt and David DeSilva, in retaliation for engaging in union activities. The Union also alleges that the City is attempting to interfere with union activities and discourage Schmidt's and DeSilva's participation, as well as that of other employees, in union activities. The City claims that the Union has failed to establish a causal relationship between DEP's discipline of Schmidt and DeSilva and any protected union activity and avers that it had legitimate business reasons to discipline these employees. In its Answer, the City reserved the right to request that the Board defer the matter to arbitration should the Union seek arbitration of the disciplinary matters. On October 23, 2007, the City moved to have the Board defer the instant improper practice petition to a pending arbitration. The Union filed its response to the City's motion on November 27, 2007. This Board finds that it would be inappropriate to defer the Union's improper practice petition to arbitration and denies the motion.

BACKGROUND[1]

DEP is authorized by the New York State Department of Environmental Conservation ("NYS DEC") to operate wastewater treatment plants ("WWTPs") in accordance with applicable State and federal statutes and regulations. WWTPs are responsible, generally, for maintaining the integrity of the water supply. DEP has WWTP operations in two geographical regions: West-of-Hudson Operations and East-of-Hudson Operations.

Prior to June 2006, DEP assigned Deputy Commissioner Paul Rush as Director of West-of-

[1] Since the issue before the Board in this interim decision is limited to the City's motion to defer the Union's petition to arbitration, only a brief synopsis of the underlying facts and positions are provided.

Hudson operations and Tim Lawler as Director of East-of-Hudson operations. Lawler resigned, and, on July 13, 2006, DEP assigned Rush as Acting Director of East-of-Hudson operations in addition to his responsibilities as Director of West-Hudson operations. The East-of-Hudson WWTPs at Mahopac and Brewster were supervised by Schmidt, who holds the civil service title Supervisor of Watershed Maintenance (Level III). As part of his duties Schmidt supervised DeSilva who holds the civil service title of Supervisor of Watershed Maintenance (Level II).

According to the Union, shortly after assuming his new responsibilities at East-of-Hudson, Acting Director Rush requested vacation schedules and found that Schmidt's and DeSilva's vacations overlapped for a period of four days. At Acting Director Rush's behest, East-of-Hudson Operations Division Deputy Director, Leigh Mulroy, informed Schmidt and DeSilva that they could not take overlapping vacations. The Union claims, and the City admits, that during an August 2, 2006 meeting, when Acting Director Rush toured the Mahopac WWTP with several employees, he informed Schmidt and DeSilva that they could not take vacations at the same time. (Pet. ¶ 5; Ans. ¶ 10). After the meeting, Schmidt and DeSilva sought the assistance of the Union. On the same day, Union representative Bill Fenty contacted Denise Dyce, DEP Director of Labor Relations, to discuss the matter. Dyce subsequently contacted Acting Director Rush to discuss the matter and thereafter, on August 3, 2007, at Rush's direction, the Deputy Director contacted Schmidt and DeSilva to inform them that they could take their vacations as scheduled beginning on August 7, 2006.

On August 11, 2006, upon returning from his vacation, Schmidt was directed by Deputy Director Mulroy to contact Armand DeAngelis, the NYS DEC Region 3 engineer, who had questions

about the Discharge Monitoring Form ("DMR") used to report lab data and test results.[2] Also on August 11, 2006, DEP served disciplinary charges upon DeSilva for violating DEP's Uniform Code of Discipline. The charges allege that DeSilva "knowingly" made a false entry on the DMR and that in doing so he neglected his duties and failed "to perform the duties assigned" to him. (Ans. Ex. K). As a result of these charges, DeSilva was suspended for thirty days. On August 13, 2006, DEP filed disciplinary charges upon Schmidt for violating DEP's Uniform Code of Discipline in that he failed "to properly supervise co-worker David DeSilva." (Ans. Ex. L). As a result of these charges, Schmidt was suspended for 30 days. The Union alleges that the DMR, submitted to the NYS DEC by DeSilva, contained certain clerical errors and no deliberate or negligent misstatements. At the conclusion of the suspensions, DeSilva was told to report to DEP's Katonah office, rather than return to the Mahopac WWTP, and Schmidt was not returned to his position of Plant Chief.

The City alleges that Acting Director Rush, as part of his new responsibilities East-of-Hudson, visited the Mahopac WWTP on August 2, 2006, accompanied by Tom Ganz, then a Wastewater Treatment Plant Process Engineer, and Michael Keating, then Chief of Wastewater Treatment, for West-of-Hudson operations. Rush, Ganz, and Keating met with Deputy Director Mulroy, Schmidt, and DeSilva to review the Mahopac Permit and discuss plant operations. The City claims that during this meeting Ganz noted several errors and areas of concern. Immediately following this meeting, Ganz and Keating discussed the necessity of further reviewing documentation at the Mahopac WWTP. The City further alleges that based on the conversations and observations made on August 2, 2006, Acting Director Rush and Keating instructed Ganz to evaluate

[2] The State Discharge Monitoring Form ("DMR") is required under 6 NYCRR § 750-2.5 to be submitted to the NYS DEC. (Ans. Ex. A).

the Mahopac WWTP, "including permits, record keeping, lab procedures, maintenance, equipment/ process operations and potential environmental health and safety issues." (Ans. ¶ 74). The City alleges that Ganz received "this exact directive" from Acting Director Rush several years earlier when DEP merged the Delaware and Catskill operations. The City also alleges that Ganz understood the Acting Director's expectations and understood that he "wanted to know what he was inheriting with the East-of-Hudson Operations Division." (Ans. ¶ 74).

The City alleges that Ganz made several visits to the Mahopac WWTP in the days that followed and determined that the Mahopac WWTP had not adhered to all applicable statutory provisions or to the terms of the Mahopac permit. Ganz, the City alleges, informed Acting Director Rush of the results of his review of the Mahopac WWTP operation. Rush briefed the Acting Deputy Commissioner, who in turn, reported to the First Deputy Commissioner.

The City further alleges that on August 11, 2006, Ganz reported his findings regarding reporting and record keeping violations to DEP Commissioner Emily Lloyd, who contacted the Department of Investigation/ Inspector General for DEP ("DEP DOI"). Disciplinary charges against both Schmidt and DeSilva followed. Moreover, the City alleges, on September 19, 2006, NYS DEC conducted its own inspection and on November 15, 2006 issued a Notice of Violation of New York State's Environmental Conservation Law at the Mahopac and Brewster WWTPs. The City alleges that fines of up to $37,500.00 per day can be levied by NYS DEC for the cited violations and that it is in the process of negotiating an Order on Consent "that will require Respondents [the City and DEP] to pay a civil monetary penalty and to comply with certain conditions imposed by the State DEC." (Ans. ¶ 103).

The Union denies that either Schmidt or DeSilva are responsible for any potential fines imposed upon the City and/or DEP and aver that the federal Environmental Protection Agency, the NYS DEC and DEP have all performed inspections in the last three years, and that none of these entities have brought any of these conditions or deficiencies to the attention of either Schmidt or DeSilva.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that DEP violated NYCCBL § 12-306(a)(1) and (3) by disciplining Schmidt and DeSilva in retaliation for their union activities and in doing so are attempting to interfere with union activities. Specifically, the Union alleges that in both cases disciplinary charges were initiated in response to the employees' having contacted the Union for assistance regarding Acting Director Rush's attempt to cancel their previously approved vacation plans.

In answer to the City's motion to defer the instant matter to arbitration, the Union argues that Board precedent "is clear that claims of anti-union animus are not deferred to arbitration." (Union Response, ¶ 1). The Union's claim that DEP retaliated against Schmidt and DeSilva in reaction to their union activity is not covered by the provisions of the collective bargaining agreement, therefore, it would be inappropriate to defer this matter to arbitration.

The Union supports its argument against deferral by citing *CSBA, Local 237,* 71 OCB 23 (BCB 2003), and, *City Employees Union, Local 237,* 77 OCB 24 (BCB 2006). The Union alleges that these decisions support the proposition that retaliation claims constitute an independent statutory

claim under the NYCCBL and, therefore, should not be deferred. The Union urges the Board to deny the City's motion but states that it has no objection to delaying the instant matter until after the disciplinary hearings "as long as the disciplinary hearings are transcribed." (Union Response, ¶ 6).

City's Position

The City alleges that the Union has failed to establish that DEP violated either NYCCBL § 12-306(a)(1) or (3). The City argues that the Union has failed to demonstrate that the City's knowledge that Schmidt and DeSilva sought the assistance of the Union to resolve the vacation scheduling dilemma was the motivating factor in the decision to impose discipline. Moreover, the City alleges, the investigation that resulted in both disciplinary actions began prior to the union activity described by the Union and uncovered legitimate bases for discipline.

In its motion to defer the instant matter to arbitration, the City explains that, after the Union filed its petition, the Union filed requests for arbitration ("RFA") on behalf of both Schmidt and DeSilva.[3] Both RFAs appeal the suspensions imposed by DEP. The City argues that therefore this petition should be deferred to the pending arbitrations as this Board has "repeatedly declined to exercise jurisdiction over improper practice petitions when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement." (City's Motion, ¶ 3). Arguing that the suspensions which form the basis of the instant petition are identical to the issues to be arbitrated in A-12399-07 and A-12420-07, the City claims that "deferral is consistent with Board precedent and eliminates the redundancy and cost of parallel proceedings on identical issues."

[3] Though the parties did not include the Requests for Arbitration in their submissions, we take administrative notice that the Office of Collective Bargaining received two Requests for Arbitration on June 26, 2007 and July 3, 2007, which have been docketed as A-12399-07, and A-12420-07, respectively.

(City's Motion, ¶ 4).

DISCUSSION

At this time the only question before the Board is whether to grant the City's motion to defer the Union's improper practice petition to the pending arbitrations brought by the Union on behalf of Schmidt and DeSilva.

As we explained in *City Employees Union, Local 237*, 77 OCB 24 (BCB 2006),

> [t]his Board like the Public Employment Relations Board ("PERB"), must comply with § 205.5 (d) of the Taylor Law (Civil Service Law, Article 14), applicable to this Board as well as to PERB, 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.
>
> Thus, while this Board has exclusive jurisdiction under NYCCBL § 12-309 (a)(4) to prevent and remedy improper public employer practices, we have declined to exercise jurisdiction over improper practices "when the basis of the claimed statutory violation is derived from a provision of the collective bargaining Agreement" or mutually agreed-upon policies. *Civil Service Bar Ass'n, Local 237, IBT,* Decision No. B-24-2003 at 10-11.

(*Id.* at 15). (additional citations omitted).

The Board will defer improper practice claims where the improper practice allegations arise from and require interpretation of a collective bargaining agreement and in cases where it appears that arbitration would resolve both the claims that arise under the NYCCBL and the agreement. *See SSEU, Local 371 (Abualroub),* 79 OCB 24 (BCB 2007) at 8; *Local 621, SEIU,* 45 OCB 16 (BCB 1990); *District Council 37,* 35 OCB 31 (BCB 1985). As we have explained in *DC 37 (Dawkins-*

Blyden), 67 OCB 27 (BCB 2001), at 8, "[w]here the contractual arbitration procedure provides an appropriate means of resolving the dispute, this Board has elected to defer the matter to arbitration."

In the improper practice petition before us the Union claims interference and discrimination for participation in protected union activity under the NYCCBL. The gravamen of the Union's allegations is that DEP retaliated against Schmidt and DeSilva by disciplining and harassing them because they both sought and received the assistance of the Union when it appeared that the newly assigned Acting Director sought to prevent them from taking their previously approved vacations. Such retaliation, if proven, may constitute interference and discrimination under § 12-306(a)(1) and (3) of the NYCCBL.

As we have previously observed, "[s]uch statutory claims are committed to adjudication under the NYCCBL rather than the arbitral forum." *SSEU (Abualroub), Id.* at 8; *see also CSBA, Local 237,* 71 OCB 24 (BCB 2003) at 11; *CWA, Local 1182,* 59 OCB 3 (BCB 1997) at 7. In *SSEU (Abualroub)*, 79 OCB 34 (BCB 2007), the Union alleged, *inter alia*, improper practice allegations of interference and discrimination for participation in protected activity under the NYCCBL where the City levied disciplinary charges against an employee arising from testimony that employee provided at the Union's request at an OATH hearing. The City argued that the improper practice claims should be deferred to arbitration. We observed that "[t]he claim of wrongful discipline under the parties' collective bargaining agreement is intertwined with the claimed violations of the NYCCBL." However, "[w]e have held that where the facts alleged to constitute a violation of the collective bargaining agreement are inextricably related to a claim of unlawful interference or discrimination, the claim cannot be deferred to be resolved separately in arbitration." *Id.* at 8. In

the matter presently before us, as in *SSEU (Abualroub),* the Union's claims under the NYCCBL cannot be resolved in the arbitral forum.

While the discipline imposed on Schmidt and DeSilva by DEP will be reviewed in the arbitral forum, there the arbitrators must determine whether the City complied with the provisions of the collective bargaining agreement in bringing disciplinary charges against Schmidt and DeSilva. However, this will leave unresolved the statutory questions of interference and discrimination raised by the Union in its petition. The matters to be resolved by the arbitrators are indeed inextricably entwined with the Union's improper practice allegations in that they arise out of the same circumstances, yet the matter before the Board in the improper practice is separate and distinct from that to be considered by the arbitrators. As discussed above, this Board has exclusive jurisdiction under NYCCBL § 12-309 (a)(4) to "prevent and remedy improper practices" enumerated in NYCCBL § 12-306. Therefore, while the declared policy of the NYCCBL is to "favor and encourage" arbitration as a means of dispute resolution, deferral would be inappropriate in this instance.[4]

[4] NYCCBL § 12-302 states, in pertinent part, that "[i]t is hereby declared to be the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."

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 motion of the City of New York to defer to arbitration the improper practice petition docketed as BCB-2574-06 be, and the same hereby is, denied.

ORDERED, that hearings in the improper practice petition docketed as BCB-2574-06 be scheduled as soon as practicable.

Dated: New York, New York
January 23, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER