Feder, 1 OCB2d 41 (BCB 2008)

(IP) (Docket No. BCB-2708-08).

Summary of Decision: Petitioner alleged that NYCHA violated NYCCBL § 12-306(a)(5) when it unilaterally implemented a change in working conditions without first bargaining by mandating that he and others complete a weekly status report updating management on projects to which they were assigned. The Board found that Petitioner lacked the requisite standing to bring a failure to bargain claim. ***(Official Decision Follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

MITCHELL FEDER,

Petitioner,

-and-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On July 18, 2008, Mitchell Feder filed a *pro se* verified improper practice petition against the New York City Housing Authority ("NYCHA"), alleging that it violated New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (5) by unilaterally implementing a change in working conditions without first bargaining, when it mandated that Feder and other employees complete a weekly status report updating management on projects to which they were assigned. NYCHA argues that Petitioner does not have standing to raise this issue, since he is not the certified bargaining representative, and that

it is management's prerogative to require that its employees perform the type of work about which Petitioner complains. The Board finds that Petitioner lacks the requisite standing to bring a refusal to bargain claim, and, accordingly, the petition in the instant matter is dismissed.

BACKGROUND

Petitioner has been employed at NYCHA in various capacities since 1998 and serves as an elected Chapter President within his Union, DC 37, Local 375, Civil Service Technical Guild, ("Union" or "Local 375"), a position of which NYCHA is aware. According to Petitioner, he is serving his second three-year term and represents the Union in Labor/Management meetings and Unit Agreement bargaining sessions.

Petitioner has been an Associate Housing Development Specialist assigned to the Office of Business and Revenue Development ("Office") since 2006. Petitioner reports to the Office's Assistant Director, who in turn reports directly to the Deputy Director. There are two other employees in the Office, who, along with Petitioner, are responsible for identifying, developing, and implementing new initiatives for the purpose of revenue enhancement.

According to NYCHA, in the past, the Office's Assistant Director would give the Deputy Director verbal status reports with regard to the status of employees' assignments during the course of regular meetings with him. NYCHA claims that the Office's management has since determined that verbal reporting was an inadequate means for tracking the progress of the employees' projects and managing the Office. In March 2008, employees were directed to maintain a weekly log or report of the status of each assignment, indicating those portions of the assignment that were completed. NYCHA claims that through this report, information is readily available to the Assistant

Director and Deputy Director. If necessary, they use the information to respond to inquiries from other managers at NYCHA.

On July 18, 2008, Petitioner filed the instant improper practice claim seeking as a remedy an order that NYCHA to cease and desist from requiring that he complete status reports and to expunge and destroy the status reports already submitted.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner contends that the new status report requirement amounts to having Union members create a weekly diary of the work they performed. He claims that in his more than 25 years of government employment, he has never been made aware of any Union-represented employee who was required to complete a weekly work schedule or a weekly assignment schedule of the assignments or jobs on which the employee worked during the week. He argues that he is unaware that this type of directive exists anywhere else, either in NYCHA or any other City agency.

Petitioner further claims that this directive contravenes NYCHA's Human Resources Manual because there is no allowance for this type of report or diary. Petitioner claims that although the form's title states "Open Assignments," the Union-represented employees were directed to include all work assignments that they have performed, including completed and uncompleted work. Additionally, Petitioner asserts that these reports could be used to discipline an employee. Therefore, NYCHA made a change in working conditions and must bargain over it and any resultant practical impact. NYCHA unilaterally decided to implement this major change without first bringing the

matter to the collective bargaining table, in contravention of NYCCBL § 12-306(a)(5).[1]

Petitioner admits that he does not have any authority to bind Local 375 to any contract or agreement, but asserts that this does not deprive him of standing. Petitioner claims that since he has the power to file a grievance, among other things, as a Local 237 official, he also has the power to file an improper practice petition, likening the filing of an improper practice petition to the filing of a grievance. After a grievance is filed at Step I, Petitioner asserts, the Local's Employee Representative assumes control of the remaining steps in the grievance process. Similarly, Petitioner, individually, claims that he has the right to file the instant petition, akin to a Step I grievance, and obtain a judgment from the Board that a change in terms and conditions of employment are a mandatory subject of bargaining. It is at that point that Local 375's representative would assume control over the issue, much like at Steps II-IV of the grievance process, and negotiate with the employer. Thus, Petitioner claims that he "has standing to file the Improper Practice Petition on behalf of the Bargaining Unit, even though he may not have direct negotiating and/or binding authority on behalf of the Union." (Reply ¶ 42).

NYCHA's Position

NYCHA claims that Petitioner does not have standing to raise issues of an alleged unilateral change to a mandatory subject of bargaining or a term or condition of employment established in a

---

[1] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
* * *
(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

prior contract because the duty to bargain runs between the employer, NYCHA, and the certified bargaining representative, the President of Local 375, DC 37. Petitioner's status as Chapter President does not empower him to bind the Union in collective bargaining or related labor-management discussions. He does not possess the level of authority required under the NYCCBL to allege a claimed violation of NYCCBL § 12-306(a)(5). The Union has not advised NYCHA that it is to recognize the title of Chapter President for bargaining purposes, and for this reason, the petition must be dismissed in its entirety.

Assuming for the sake of argument that Petitioner has standing to bring this petition, the reporting requirement about which he complains is not within the scope of bargaining. It is management's prerogative to require its staff to complete a weekly log or summary record that lists all assignments open at the end of the week; therefore, the petition must be dismissed in its entirety for failure to state a claim.

DISCUSSION

Petitioner claims that NYCHA unilaterally made a change to a mandatory subject of collective bargaining during a period of negotiations, in violation of NYCCBL § 12-306(a)(5). This provision states that it is an improper practice for a public employer to "unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract during a period of negotiations with a public employee organization as defined in subdivision d of §12-311 of this chapter." Here, NYCHA challenges Petitioner's standing to assert this claim because he is an individual who has not been authorized to file such a claim by the certified bargaining representative. Because we find that NYCHA is correct, and that

Petitioner lacks standing to bring this claim, we dismiss the petition.

It is well settled that only the bargaining unit certificate-holder may bind a Union in a contractual agreement with the employer, and this Board and the Public Employment Relations Board ("PERB") have long held that the duty to bargain runs only between the public employer and the designated bargaining representative. *Colella*, 79 OCB 27, at 52 (BCB 2007); *Edwards*, 65 OCB 35, at 10 (BCB 2000); *McAllan*, 31 OCB 15, at 19 (BCB 1983); *see State of New York*, 17 PERB ¶ 3034 (1984). Therefore, only the labor organization holding the bargaining certificate has standing to bring an action claiming a violation of NYCCBL § 12-306(a)(5).

For example, in *Colella*, an individual petitioner claimed that the City violated both NYCCBL § 12-306(a)(4) and (5) by unilaterally altering a transportation policy. We stated:

> Petitioner does not have standing to assert a unilateral change in terms and conditions of employment. This Board has consistently held that 'while an individual public employee may generally commence an improper practice proceeding, the duty to refrain from making unilateral changes to established terms and conditions of employment exists only between a labor organization and a public employer.' *Howe*, 77 OCB 32 (BCB 2006) at 15 (citing, *inter alia*, *McAllan*, 31 OCB 15, at 15 (BCB 1983), and *Robinson*, 69 OCB 43 (BCB 2002)); *see also Edwards*, 65 OCB 35, at 10 (BCB 2000). Accordingly, Petitioner's claims that the City violated NYCCBL § 12-306(a)(4) and (5), and derivatively § 12-206(a)(1), by implementing the transportation policy are dismissed.

Id. at 52. Further, the bargaining certificate-holder is the entity that determines who is empowered to file claims on its behalf, whether it is via its President or other designated officials. *Local 1157, DC 37,* 1 OCB 2d 7, at 13-14 (BCB 2008).

In the instant matter, although Petitioner may be correct when he asserts that, as the Chapter President, he has the power to file grievances and perform other tasks, he is incorrect when he asserts that this same status allows him to file an improper practice claim that NYCHA violated NYCCBL

§ 12-306(a)(5). `Unlike the filing of a grievance at Step I, to which Petitioner likens the filing of an improper practice petition, a claim that an employer has breached either NYCCBL § 12-306(a)(4) or (5) may be filed only by those whom the certified bargaining representative has authorized to do so. *Id.* Here, Local 375 holds the bargaining certificate for those in his title. Petitioner explicitly admits that he does not have the power to bind the Union to an agreement, and he does not assert that the Union has given him the authority to file such a bargaining claim. Since only Local 375 and those authorized by it may file a claim under either NYCCBL § 12-306(a)(4) or (5), Petitioner does not have the requisite authorization to file the instant improper practice petition, and he lacks standing to bring a claim under NYCCBL § 12-306(a)(5). Accordingly, we dismiss the 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 docketed as BCB-2708-08, be and the same hereby is, dismissed as to any claims arising under NYCCBL § 12-306(a)(5).

Dated: New York, New York
November 10, 2008

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER