Local 1157, DC 37, 1 OCB2d 7 (BCB 2008)

(IP) (Docket No. BCB-2656-07).

Summary of Decision: Petitioners allege that the City is unilaterally making changes to annual leave, sick leave, and leave regulation accruals for employees in the title of Supervisor Highway Repairer. Local 1157 claims that the City's decision to implement these changes without bargaining violates NYCCBL § 12-306. The Board made an interim determination that the Union lacks the requisite standing to bring a claim under NYCCBL § 12-306(a)(4) or (5) but reserves a determination on claims that the City violated § 12-306(a)(1), (2), and (3) for a later decision. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 1157, DISTRICT COUNCIL 37, AFSCME, AFL-CIO and MICKEY MCFARLAND,

Petitioners,

-and-

CITY OF NEW YORK,

Respondent.

INTERIM DECISION AND ORDER

On October 4, 2007, Local 1157, District Council 37, AFSCME, AFL-CIO ("Local 1157") and co-Petitioner Mickey McFarland, through Local 1157's attorneys, filed a verified improper practice petition and request for injunctive relief against the City of New York ("City"). Local 1157 alleges that the City is unilaterally effectuating changes to annual leave, sick leave, and leave regulation accruals for employees in the title of Supervisor Highway Repairer ("SHR"). Local 1157

claimed that the City's decision to implement these changes without bargaining violates § 12-306(a)(5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). On October 22, 2007, Local 1157 filed an amended improper practice petition to state claimed violations of § 12-306(a)(1), (2), and (3). The City argues that on its own, without the authorization or consent of District Council 37, AFSCME, AFL-CIO ("DC 37"), the holder of the bargaining certificate, Local 1157 lacks proper standing to bring a claim under the NYCCBL and that, in any event, it failed to establish that the City has violated any provision of the NYCCBL. The request for injunctive relief was denied by the Board on October 25, 2007.[1] The Board finds that the Union lacks the requisite standing to bring a claim under NYCCBL § 12-306(a)(4) or (5) but reserves a determination on the claims that the City violated § 12-306(a)(1), (2), and (3) for a later decision.

BACKGROUND

Local 1157 is a constituent part of DC 37 that includes as members individuals employed in the job title SHR. On February 2, 1978, the Board of Certification determined, in 22 OCB 2 (BOC 1978), that DC 37; Civil Service Forum, Local 300, SEIU, AFL-CIO; and Pavers and Roadbuilders District Council, Laborers' International Union, AFL-CIO should be certified as the joint representatives for the purposes of collective bargaining for all Foreman Highway Repairers,

[1] On October 10, 2007, DC 37 filed a verified improper practice petition and request for injunctive relief regarding the same set of facts. After the City raised the issue of standing, and prior to the filing of Local 1157's amended petition, which included other violations of the NYCCBL, DC 37 submitted a letter at the request of the Board that asserted that Local 1157 lacked the requisite standing to bring a claim with regard to NYCCBL § 12-306(a)(5). DC 37's request for injunctive relief was also dismissed on October 25, 2007, on different grounds. We will discuss both proceedings in greater detail in the Background of this decision.

Highway Repairers, and Highway Repairers (CETA) employed by the City of New York. 30 OCB 50 (BOC 1982) amended 22 OCB 2 (1978) by changing the name of the title Foreman Highway Repairers to SHR. In addition, DC 37 was the union signatory to SHRs' last signed agreement, which was a Consent Determination covering the period of April 1, 1995 through March 31, 2000.

SHRs are "prevailing rate" employees, which means that these employees serve in titles that are covered by N.Y. Labor Law § 220 ("§ 220"). Accordingly, these employees are paid wage rates and supplemental benefits that are dictated by the New York City Comptroller and mimic the wage rates and supplemental benefits received by the private sector. However, since 1984, § 220 has also provided that the public employer and the employee organization "shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements . . ." of the employees in the title.[2] When an agreement is reached, with respect to wages and supplements, the terms of that agreement are reflected in a "Consent Determination," which is issued by the local fiscal officer. Section 220 further provides that if the public employer and the employee organization "fail to achieve an agreement," the employee organization can file a complaint that initiates the statutory process for obtaining an independent determination by the Comptroller. Once the Comptroller makes a determination, that determination may be appealed in the courts.

The section of the NYCCBL that defines the duty to bargain makes special provision for § 220 employees. NYCCBL § 12-307(a)(1) states that "with respect to those employees whose wages are determined under section two hundred and twenty of the labor law, the duty to bargain in good faith over wages and supplements shall be governed by said section."

SHRs' last negotiated agreement was a Consent Determination covering the period of April

[2] 1984 New York Laws, chapter 767, amending Labor Law § 220.8-d.

1, 1995 through March 31, 2000. As the Consent Determination's expiration date drew near, DC 37 and the City began negotiations for a successor agreement on wages and supplements. The parties met numerous times, but were unable to reach a voluntary settlement. As a result, DC 37 exercised its rights under § 220 and requested that the Comptroller commence the statutory process for obtaining the Comptroller's independent determination, which includes a survey to determine the prevailing wage rate and supplemental benefits for the title.

On August 19, 2004, the Comptroller's Bureau of Labor Law ("Comptroller's Bureau") issued its preliminary determination, which covered the period April 1, 2000 through June 30, 2005. In its determination, the Comptroller's Bureau stated that the applicable wage and supplement rates for SHRs should be equated to the wage and supplement rates of workers represented by Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, AFL-CIO and workers represented by Highway, Road, and Street Construction Laborers Local Union 1010. After the preliminary determination was issued, DC 37 and the City were unsuccessful at reaching a voluntary settlement based upon these findings.

On December 10, 2004, Local 1157's counsel wrote a letter to the Comptroller to complain about the City's actions at a meeting between the parties that occurred on December 8, 2004 and requested a hearing at the New York City Office of Administrative Trials and Hearings ("OATH") regarding its claims. The Union claims that at the December 8 meeting, the City took the position that it rejected the Comptroller's preliminary determination, and that SHRs were not covered by Labor Law § 220. Local 1157 asserts that the City announced that it accordingly would negotiate with the Union based upon the increases contained in the relevant Citywide agreements applicable

to non-prevailing rate titles. The City denies these allegations.

Pursuant to § 220, the City challenged the preliminary determination, and a hearing was held at OATH on October 19, 2005. On January 23, 2006, OATH issued a report and recommendation to the Comptroller affirming the Comptroller Bureau's findings in their totality, and on March 2, 2006, the Comptroller issued a Final Order and Determination adopting OATH's findings. The Comptroller's Final Order and Determination stated, in pertinent part:

> It is Hereby Determined that:
>
> 1. The prevailing rates of wages and benefits to be paid to employees in the title of [SHR] during the period April 1, 2000 through June 30, 2005 are those of foremen of the Highway, Road, and Street Construction Laborers Local Union 1010 and Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, AFL-CIO.
>
> It is Hereby Ordered that:
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> 2. The [City] shall pay to its employees in the title [SHR] for the period April 1, 2000 through June 30, 2005, the wages and benefits of foremen of the Highway, Road, and Street Construction Laborers Local Union 1010 and Sheet Asphalt Workers Local Union 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, AFL-CIO. . . .

The City then appealed this determination to the Appellate Division, First Department. On June 14, 2007, the Appellate Division unanimously confirmed the Comptroller's Final Order and Determination.

On September 6, 2007, the City and DC 37 met again to attempt to negotiate an agreement. At this meeting, the City made a proposal to DC 37 regarding wages and supplements. On September 21, 2007, a DC 37 negotiator made a counter-proposal to the City by e-mail.

On September 26, 2007, an Assistant Commissioner at OLR sent DC 37's Research and Negotiations Division a letter. It stated in pertinent part:

> This letter is to inform you that, pursuant to the attached Appellate Division Order dated June 14, 2007 (41 A.D.3rd 207), [OLR] will, as soon as practicable, implement the Comptroller's Final Order and Determination (the "Order") covering [SHRs] for the period April 1, 2000 to June 30, 2005.
>
> Pursuant to the [Order], OLR will be paying the retroactive hourly wages, night shift differential and overtime based on the Local 1018 rates, retroactive to April 1, 2000.
>
> With regard to the Local 1018 hourly fringe benefits rates as set forth in the Order, OLR will initially implement the necessary leave accrual recalculations *prospectively*, based on the costing that was shared with you at our bargaining session on September 6, 2007. As a result, going forward, SHR's will accrue 4 ½ fewer annual leave days and 5 fewer sick days per annum. In addition, SHR's will no longer be eligible for the "Leave Regulation" benefits as outlined in Appendix A, Article III section 1 (a) – (f). As previously stated, these leave accrual recalculations are necessary in order to match the Local 1018 hourly fringe benefit rates as set forth by the Comptroller.
>
> With regard to the *retroactive* Local 1018 hourly fringe benefit rates dating back to April 1, 2000, OLR is currently recalculating the amount of retroactive leave that will need to be taken from each SHR in order to match the rates contained in the Order. Once that amount has been ascertained we will advise you of how much over-accrued leave each SHR owes the City and when it will be debited from their existing leave balances. . . .

(Emphasis in original.)

The leave regulation benefits that were eliminated include bereavement leave, jury duty leave, leave for court attendance under subpoena or court order, a health department required absence, absence to take a civil service examination or interview, and leave to attend as a delegate or alternate to a State or National veteran or volunteer firefighter organization's convention.

The City claims that it was required to impose the changes regarding leave in order to implement the Comptroller's Determination because it was faced with an order from the Appellate Division, and would face criminal penalties if it did not implement it.

On October 4, 2007, Local 1157, acting through its own attorneys, filed the instant verified

improper practice petition and a request for injunctive relief against the City alleging a violation of NYCCBL § 12-306(a)(5). Based upon the same set of facts as recited here, on October 10, 2007, DC 37, through its attorneys, filed a verified improper practice petition and request for injunctive relief against the City, alleging violations of NYCCBL § 12-306(a)(1), (2), (3), (4), and (5). DC 37's improper practice petition and request for injunctive relief were docketed as BCB-2660-07 and BCB-2660-07 (INJ), respectively.

Regarding the injunctive relief request, the City argued in its answer that because DC 37 is the certified bargaining representative of the employees in question, Local 1157 and the individual named in its petition did not have standing to seek injunctive relief on behalf of these employees.

In its reply to the City's answer regarding Local 1157's request for injunctive relief, Local 1157 for the first time included assertions that the City's actions violated NYCCBL § 12-306(a)(1), (2), and (3).[3] The City asked that the Board allow it to submit a surreply or, in the alternative,

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[3] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
(2) to dominate or interfere with the formation or administration of any public employee organization;
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
(4) 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;
(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.

NYCBL § 12-305 provides in pertinent part:
Rights of public employees and certified employee organizations. Public

disregard any new claims raised by Local 1157 in its reply.

On October 22, 2007, Local 1157 filed an amended improper practice petition to state claimed violations of NYCCBL § 12-206(a)(1), (2), and (3). On October 25, 2007, the Board denied both Local 1157's and DC 37's requests for injunctive relief. As to Local 1157's claims for injunctive relief, the Board unanimously held that only the certified representative of the affected employees had standing to raise bargaining claims under NYCCBL § 12-306(a)(4) or (5) and dismissed Local 1157's injunctive relief petition. In so determining, the Board stated that consistent with § 1-07(d)(6) of the Rules of the Office of Collective Bargaining ("OCB Rules"), it did not consider the new facts or arguments raised in Local 1157's reply and thus did not reach the question of Local 1157's standing to assert such new and different claims.[4]

In the instant improper practice petition, Local 1157 requests as a remedy that the Board order the City to rescind its decision to reduce and eliminate leave benefits provided SHRs; cease and desist from making any unilateral changes in leave or other benefits accrued by or provided to SHRs, whether retroactively or prospectively; continue to provide SHRs with the same leave provided to them under their most recent Consent Determination unless and until a new Consent

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> 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. . . . A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

[4] Section 1-07(6) of the OCB rules provides in pertinent part:
A reply is not required; any new facts alleged in the response will be deemed denied by the petitioner. If a reply is filed, it shall be verified and shall contain admissions and denials of any facts alleged in the answer. The reply should be limited to a response to specific facts or arguments alleged in the answer, and the Board may disregard new facts or new arguments raised therein. . . .

Determination is agreed upon and in effect; and make every SHR whole for any loss or reduction in benefits they have suffered.

POSITIONS OF THE PARTIES

Union's Position

Local 1157 argues that the City's unilateral prospective reduction and elimination of leave available to SHRs constitutes a violation of its constitutional right to due process, a violation of Labor Law § 220, and a violation of, among other things, the Public Employees' Fair Employment Act, the NYCCBL, and Petitioners' and SHRs' rights under the common law. As for the NYCCBL, the Union contends that the City's unilateral and prospective reduction and elimination of leave available to SHRs violates NYCCBL § 12-306(a)(5). Contrary to the City's assertion, Local 1157 does have standing to assert a claim under § 12-306(a)(5) because the plain language of the statute must be given effect. In addition and in the alternative, the City waived any standing objection by having failed to raise it during the Labor Law § 220 proceeding.

Local 1157 contends that the City's actions violate NYCCBL § 12-306(a)(1), (2), and (3) as they have the effect and/or intended purpose of: 1) punishing Petitioners and SHRs for rejecting the idea of negotiating with the City on the basis of the Citywide agreement and, instead, collectively, as a local, insisting that their rights under Labor Law § 220 be respected; 2) deterring, interfering with, and restraining SHRs from exercising their statutory rights as employees of the City and as members of Local 1157, including their rights under NYCCBL § 12-305; 3) dominating or interfering with the administration of Local 1157; and, 4) discriminating against SHRs for the purpose of discouraging their participation in the activities of Local 1157 and undermining Local

1157's ability to function.

City's Position

The City argues that in order to properly assert an improper practice claim as it relates to NYCCBL § 12-306(a)(4) or (5), the party who brings such a claim, either individually or on behalf of its members, must hold the bargaining certificate to negotiate on behalf of those members. Petitioners wrongly assume that they have standing to represent SHRs before the Board. This assumption is without basis since they do not hold the bargaining certificate to act as the certified bargaining entity for the party for which they seek relief. The Board affirmed this position in its October 25, 2007 determination on the request for injunctive relief which dismissed Local 1157's claim for lack of standing. Petitioners also lack standing to assert a claimed violation of NYCCBL § 12-306(a)(1), (2), or (3) because the underlying facts for their claims arise from allegations that the City refused to bargain in good faith collectively and/or unilaterally made a change to a mandatory subject of bargaining in violation of § 12-306(a)(4) or (5).

If the Board determines that it must consider the remaining allegations under NYCCBL § 12-306(a)(1), (2), and (3), the City contends that Local 1157 failed to establish such claims since it cannot show that the City violated § 12-306(a)(1) or (3) by retaliating against it for engaging in protected activity.

DISCUSSION

Under NYCCBL § 12-309, this Board has the exclusive power to remedy improper practices by both an employer and an employee organization. NYCCBL § 12-309(a) provides, in pertinent part:

> The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
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> * * *
>
> (4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter . . . .

A number of the Union's claims concern matters that are beyond our jurisdiction. Several times, the Union claims that the City's actions violate a statute other than our own. The Union claims that the City's unilateral prospective reduction and elimination of leave available to SHRs constitutes a violation of their constitutional right to due process, a violation of Labor Law § 220, and a violation of, among other things, the Public Employees' Fair Employment Act, the NYCCBL, and Petitioners' and SHRs' rights under the common law. Since this Board only has jurisdiction to resolve those claims which arise under the NYCCBL, our decision is limited to such claims; all other claims are dismissed without prejudice.

With respect to Local 1157's claimed violation of NYCCBL § 12-306(a)(4) or (5), the Union is correct when it asserts that the OCB Rules and NYCCBL § 12-306(e) permit any "public employee organization" or employee to file an improper practice petition. However, a petitioner must have the requisite standing to bring the particular cause of action stated in the petition. *Colella*, 79 OCB 27 (BCB 2007) at 52; *Howe*, 77 OCB 32 (BCB 2006) at 25. Local 1157 claims that the City unilaterally made a change to a mandatory subject of collective bargaining–paid leave– during a period of negotiations. Thus, the instant claim raises issues pertaining to the City's duty to bargain, which are addressed in NYCCBL § 12-306(a)(4) and (5).

NYCCBL § 12-306(a)(4) states that it is an improper practice for a public employer or its agents 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. NYCCBL § 12-306(a)(5) provides 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.

The Board has addressed the subject of standing in relation to the duty to bargain on a number of occasions. We have long held that pursuant to NYCCBL § 12-306(a), the duty to bargain runs only between the public employer and the certified bargaining representative, a view that is also held by the Public Employment Relations Board ("PERB"). *Colella*, 79 OCB 27 (BCB 2007) at 52; *Edwards*, 65 OCB 35 (BCB 2000) at 10; A *Majority of the Civil Service Elevator Mechanics and Elevator Mechanics Helpers in Local 237*, 43 OCB 53 (BCB 9189) at 14; *McAllan*, 31 OCB 15 (BCB 1983) at 19; *see State of New York*, 17 PERB ¶ 3034 (1984). More specifically, in a case strikingly similar to the instant matter, *Local 2507, District Council 37, AFSCME*, 39 OCB 22 (BCB 1987), Local 2507, a constituent of DC 37, filed an improper practice petition without the consent of DC 37 and alleged that the City failed to bargain in good faith. However, DC 37, and not Local 2507, had been certified by the BOC as the exclusive bargaining representative of the effected employees in a joint certification that did not include Local 2507. The City challenged Local 2507's right to pursue such a claim, and the Board squarely addressed the issue of standing. We stated, in pertinent part:

> The express language of the NYCCBL leaves no doubt that an employer owes the duty to bargain in good faith only to the certified bargaining representative. Since Local 2507 is not the certified bargaining representative, petitioner fails to satisfy an essential predicate to the establishment of standing to assert a claimed refusal to bargain under our law. . . .

* * *

> Since Local 2507 is not the certified bargaining representative of the [title], and since the jointly certified representatives, have neither authorized nor consented in writing to the filing of the instant improper practice charge, the petition herein fails to state a cognizable injury under our law and the charge must, therefore, be dismissed.

Id. at 7-8; *see also CSTG*, 79 OCB 41 (BCB 2007) at 16.

The Board relied on *Long Island State Park and Recreation Commission*, 16 PERB ¶ 4664 (1983), in part, to reach its conclusion. In that matter, Local 2744, Jones Beach Life Guard Corp. alleged that a state agency violated its bargaining obligation by unilaterally changing employees' conditions of employment. PERB noted that an inquiry disclosed that the recognized or certified representative of the employees in question was Council 82 and not the charging party.[5] PERB's Director dismissed the claim and noted, "Since a charge of this nature, by statute, may be brought only by the certified or recognized employee organization (Act. §209-a.1[d]), the charging party lacks standing to lay the charge in this proceeding." *Id.* at 4859.

The instant matter has many factual parallels with *Local 2507, District Council 37, AFSCME*: in both, a local filed an improper practice petition without the authorization of the certified bargaining representative, District Council 37, concerning the employer's duty to bargain. The only distinction of note between the prior case and the instant matter is that in the prior decision, the Local filed a claim alleging only a violation of NYCCBL § 12-306(a)(4), and, in the instant matter, the Local also claims a violation of § 12-306(a)(5). This distinction is insignificant because both § 12-306(a)(4) and (5) involve the employer's duty to bargain. In *Colella*, 79 OCB 27 (BCB 2007), the Board dismissed a petitioner's claims that the City had violated both NYCCBL § 12-

[5] Although it was not mentioned in the decision, it appears that at the time of the decision, Local 2744 was a constituent part of Council 82.

306(a)(4) and (5) by unilaterally altering a transportation policy, applying the same analysis to both provisions in one paragraph. *Id.* at 52. We stated:

> Further, 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 (BCB 1983) at 15, and *Robinson*, 69 OCB 43 (BCB 2002)); *see also Edwards*, 65 OCB 35 (BCB 2000) at 10. 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. In sum, both § 12-306(a)(4) and (5) of the NYCCBL refer to the duty to bargain, and, as such, only the party holding the bargaining certificate has standing to bring an action claiming a violation of these provisions.

Based on the above, we find that neither Local 1157 nor the individual cited in the petition has standing to bring a claim under § 12-306(a)(4) or (5). Since neither Local 1157 nor the individual are the certified bargaining representative of SHRs and since DC 37, one of the jointly certified representatives, has not authorized the filing of the Local 1157's injunctive relief petition and, instead, has filed its own petition, Local 1157 does not have standing to assert the claim presented in the petition.

The merits of the additional claims advanced by Local 1157 in its amended petition, that the City violated § 12-306(a)(1), (2), and (3) of the NYCCBL, will be determined in a later decision. Accordingly, we dismiss those claims raised by Local 1157 that pertain to an alleged violation of NYCCBL § 12-306(a)(4) and (5), and will issue a separate decision addressing Local 1157's claims under NYCCBL § 12-306(a)(1), (2), and (3), at a later date.

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-2656-07, be and the same hereby is, dismissed as to any claims arising under NYCCBL § 12-306(a)(4) and (5); and it is further

DETERMINED, that the remaining claims asserted in BCB-2656-07 will be addressed by this Board at a later date.

Dated: New York, New York
January 23, 2008

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