LEEBA, 11 OCB2d 1 (BCB 2018)

(IP) (Docket No. BCB-4228-17)

Summary of Decision: The City of New York Office of Labor Relations claimed that LEEBA repudiated a memorandum of agreement, in violation of NYCCBL § 12-306(b)(2) and (c)(5), when it refused to sign a successor agreement, made additional economic demands, and sought the appointment of a mediation panel regarding those demands. LEEBA argued that it was unable to sign the successor agreement until certain economic demands had been bargained. It also contended that its demands should have been included in the memorandum of agreement. The Board found that LEEBA had bargained in bad faith. Accordingly, the improper practice petition was granted. ***(Official decision follows)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS,

Petitioner,

-and-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On July 28, 2017, the City of New York Office of Labor Relations ("City") filed a verified improper practice petition against the Law Enforcement Employees Benevolent Association ("LEEBA" or "Union"). The City alleges that the Union repudiated a memorandum of agreement ("MOA" or "2010-2018 MOA"), in violation of § 12-306(b)(2) and (c)(5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), when it refused to sign a successor agreement ("2010-2018 Agreement"), made additional economic demands, and sought the appointment of a mediation panel regarding those

demands. LEEBA argues that it was not required to sign the 2010-2018 Agreement until certain economic demands had been bargained to completion. It also contends that its outstanding demands should have been included in the MOA. The Board finds that LEEBA bargained in bad faith. Accordingly, the improper practice petition is granted.

BACKGROUND

LEEBA is the current representative for the Highways and Sewers Inspector bargaining unit. Prior to October 2015, the bargaining unit was represented by the Laborers' International Union of North America, Local 1042, Pavers and Road Builders District Council ("LIUNA"). The City and LIUNA were parties to a collective bargaining agreement, effective October 15, 2008 to October 14, 2010 ("2008-2010 Agreement"). On May 19, 2015, they signed an MOA covering the period from October 15, 2010, to June 17, 2018 ("MOA" or "2010-2018 MOA"). This MOA was ratified by the bargaining unit on April 9, 2015, and the City implemented its terms except as discussed below.

The terms of the MOA set forth that negotiations had concluded on all subjects, with a limited exception for gainsharing. It explicitly provides that the parties "intend by this 2010-2018 MOA to cover all economic and non-economic matters and . . . incorporate the terms of this 2010-2018 MOA into the [2010-2018 Agreement] . . ."[1] (Pet., Ex. 1) (italics omitted) Additionally, by the terms of the MOA, the parties agreed "to continue all the same terms and conditions specified in the [2008-2010 Agreement], including applicable side letters, terminating on October 14, 2010, except as modified or amended below." (*Id.*) (italics omitted) Finally, MOA § 8, entitled

[1] The 2010-2018 MOA was appended to the Petition as Exhibit 1.

"Prohibition of Further Economic Demands," states that "[e]xcept as provided for in [§] 7, no party to this agreement shall make additional economic demands during the term of the 2010-2018 MOA or during the negotiations for the [2010-2018 Agreement]."[2] (*Id.*) (italics omitted)

The MOA also sets out a schedule for six general wage increases for each year between 2012 and 2017. The final wage increase of 3% was set to take effect on April 15, 2017. However, pursuant to MOA § 10, this final wage increase "shall not be paid unless and until there is a signed [2010-2018 Agreement]." (Pet., Ex. 1) The parties do not dispute that the final 3% wage increase has not been implemented. Although amended figures are not specified within the MOA, the 2008-2010 Agreement provides for salary ranges applicable to unit members with certain levels of seniority.

Within 30 days of the signing of the MOA, LEEBA filed a petition to represent the bargaining unit. *See LEEBA*, 8 OCB2d 29 (BOC 2015). The Board conducted an election to determine which union the bargaining unit wished to be represented by for purposes of collective bargaining. LEEBA won the election and, on October 6, 2015, was certified as the bargaining representative. *See id*.

On January 15, 2016, LEEBA filed a request for arbitration with the Office of Collective Bargaining ("OCB") arguing that the City has improperly failed to pay unit members the maximum level of salary set forth in the 2008-2010 Agreement salary ranges.[3] The arbitrator found that the

[2] MOA § 7, addressing so-called "gainsharing," provides in relevant part that parties "may identify, review, recommend and develop initiatives that will generate workplace savings, maximize the potential of the City workforce and ensure the provision of essential services, while at the same time providing increased compensation for the workforce." (Pet., Ex. 1) However, the provision also required the conclusion of any such discussions by April 9, 2017.

[3] On March 2, 2016, the City challenged the arbitrability of the Union's grievance. The Board found the grievance arbitrable and denied the City's challenge. *See LEEBA*, 9 OCB2d 12 (BCB 2016).

2008-2010 Agreement did not compel the City to pay unit members the maximum rate available and denied the grievance. (Pet., Ex. 11)

As of March 2017, the parties had not signed the 2010-2018 Agreement. According to the City, on March 24, 2017, Office of Labor Relations ("OLR") Assistant Commissioner Daniel Pollak met with LEEBA President Kenneth Wynder and counsel Stuart Salles, and presented them for signature a proposed letter agreement ("March Letter") "certifying that there are no outstanding economic or non-economic issues for the [2010-2018] round [of bargaining] and agreeing that the three percent wage increase would be paid as soon as practicable." (Pet. ¶ 10) The Union did not sign the March Letter. The Union alleges that it declined to do so because it did not want to "certify[] that the Bargaining Unit seeks no further negotiation or bargaining on any subject" of the MOA. (Ans., ¶ 38) The City further alleges that the Union indicated that it would prefer to sign the 2010-2018 Agreement rather than the March Letter. Therefore, on March 29, 2017, the Assistant Commissioner sent the 2010-2018 Agreement, incorporating the terms of the MOA, to LEEBA's counsel. The Union does not dispute these allegations or the fact that the 2010-2018 Agreement remains unsigned.

On March 30, 2017, the parties had a phone conversation regarding the Union's concerns about the 2010-2018 Agreement. The City asserts that Union counsel "indicated he was not comfortable with the provisions in the agreement relating to performance compensation, performance standards, and the OLR First Deputy Commissioner's discretion to waive the new hire rate." (Pet., ¶ 12) The Union does not dispute this characterization, explaining that it was seeking "clarity on the mechanism as to how a member can advance to [m]aximum pay" and contends that a mechanism to advance to maximum pay "should have been . . . included in the

[2010-2018 Agreement]."[4] (Ans., ¶ 39) The City asserts, and the Union does not deny, that these issues were not raised during the bargaining for the MOA.

Later that day, the Assistant Commissioner sent Union counsel a follow-up email reiterating the City's position that the MOA covered all economic and non-economic matters for the term of the 2010-2018 Agreement, that it continues all terms of the prior bargaining agreement except as modified by the MOA, and that it established that the parties would incorporate all the agreed-upon terms into the 2010-2018 Agreement. Consequently, the City stated that it "would not be willing to discuss any additional changes to the [2008-2010 Agreement] not embodied in the 2010-2018 MOA." (Pet., Ex. 4) The City also stated that all that remained was for the parties to execute the 2010-2018 Agreement, thereby incorporating the terms of the MOA into the parties' collective bargaining agreement.

On June 2, 2017, the Union filed a request for mediation with OCB ("Request for Mediation") seeking a mediation panel and certifying, pursuant to section 1-04(a)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), that "the above mentioned parties have been unable to agree on the terms of a collective bargaining agreement." (Pet., Ex. 5) By letter dated June 26, 2017, the Union explained that it was requesting the appointment of a mediation panel because the MOA "signed by [LIUNA] did not . . . end the bargaining process." (Pet., Ex. 7) Rather, it asserted, MOA § 10 "specifically indicates that the bargained-for [3.0% wage] increase shall not be paid until there is a 'signed [2010-2018 Agreement].'" *Id.* The Union asserted that the City had improperly refused to pay

[4] At the conference in this matter, the Union did not deny that its March 30th statement concerned performance compensation and performance standards by which unit members could achieve the maximum rate of pay, but asserted that these concerns were an effort to discuss gainsharing as contemplated by MOA § 7.

the wage increase and simultaneously was refusing to bargain the 2010-2018 Agreement to completion. In a letter dated July 13, 2017, the Union further stated it "has requested [OLR] to open up new bargaining negotiations" to renegotiate the terms of the 2010-2018 Agreement. (Pet., Ex. 9)

Following a review of the parties' submissions, on July 19, 2017, OCB's Deputy Chair of Dispute Resolution declined to appoint a mediator.[5] (Ans., Ex. 10) On July 28, 2017, the City filed the instant improper practice petition.

POSITIONS OF THE PARTIES

City's Position

The City asserts that the Union has failed to bargain in good faith in violation of NYCCBL §§ 12-306(b)(2) and 12-306(c)(5).[6] Specifically, it alleges that the Union has repudiated the MOA by refusing to incorporate the terms of that agreement into the Unit Agreement. The City contends that bargaining concluded and that the MOA, by its terms, was intended to cover "all economic and non-economic matters" and to continue the terms of the 2008-2010 Agreement (except as otherwise specified in the MOA). (Pet., Ex. 1) Further, after the MOA was executed, the

[5] Further, the Board takes administrative notice that, on July 31, 2017, the Deputy Chair of Dispute Resolution sent an additional letter explaining that "in the absence of the City's consent, mediation is not the appropriate forum to address the legal dispute as to whether the City is obligated to engage in additional bargaining for the 2010-2018 term."

[6] NYCCBL § 12-306(b)(2) establishes that it is an improper practice for a public employee organization to "refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining . . . . "

NYCCBL § 12-306(c)(5) establishes that, where an agreement is reached, bargaining in good faith includes the obligation "to execute upon request a written document embodying the agreed terms, and to take such steps necessary to implement the agreement."

agreement was implemented. The City further argues that there is no duty to bargain mid-term absent unforeseen changed circumstances.

The City contends that the Union is willfully repudiating the MOA by attempting to reopen negotiations mid-term to include provisions that provide for unit members to achieve the maximum salary within the ranges set forth in the 2008-2010 Agreement. It alleges that these issues were not raised in the previous round of bargaining. Therefore, the Union's conduct constitutes bargaining in bad faith. Moreover, the mechanism by which unit members achieve a maximum salary rate has long been subject to management's discretion.

Union's Position

The Union contends that the City has failed to state an improper practice claim. It asserts that it is not attempting to reopen negotiations on the MOA, but rather is fulfilling its obligation to the unit members to negotiate over the terms of the 2010-2018 Agreement. The Union is thus unable to sign the March Letter because it believes that the 2010-2018 Agreement should contain provisions regarding performance compensation and performance standards that would clarify how unit members may advance to the maximum pay available. Accordingly, the Union asserts that it is making a good-faith effort to bargain on behalf of its members.

Additionally, the Union argues that the City has improperly refused to entertain further discussions, thereby forestalling the final 3% salary increase available under the MOA. The City's refusal to discuss matters "within the scope of the unresolved economic disputes . . . are blocking the finalizing and signing off on the [2010-2018 Agreement]." (Ans., ¶ 42) The Union asserts that such a refusal represents a failure by the City to act in good faith.

DISCUSSION

The central question before the Board is whether the Union has failed to bargain in good

faith by refusing to sign the 2010-2018 Agreement and attempting to engage in continued negotiations on economic terms, contrary to the terms of the MOA. We find that such conduct constitutes bad faith bargaining in violation of NYCCBL §§ 12-306(b)(2) and 12-306(c)(5).[7]

The NYCCBL explicitly provides that the duty to bargain in good faith includes the obligation "to execute upon request a written document embodying the agreed terms, and to take such steps necessary to implement the agreement." NYCCBL § 12-306(c)(5). Short of an express refusal to bargain, "the Board will evaluate a party's failure to bargain in good faith in light of the totality of the circumstances surrounding the events in question." *See NYSNA*, 6 OCB2d 23 (BCB 2013); *see also LEEBA*, 2 OCB2d 29, at 9 (BCB 2009); *Cheatham*, 27 OCB 13, at 8 (BCB 1981); *Town of Southampton*, 2 PERB ¶ 3011, at 3274 (1969).

As the Public Employment Relations Board ("PERB") has explained, "[i]f hindsight subsequent to agreement and ratification provide a basis to repudiate the agreement then the collective negotiating process would not only be unterminable but meaningless." *See Bd. of Educ. of City of New York*, 3 PERB ¶ 3095, 3611 (1970). Thus, PERB has found that a public employer sustained its burden to demonstrate bad faith where a union's membership voted to rescind the ratification of a bargaining agreement because it was dissatisfied with the salary increase that the union had bargained during negotiations. *See id*; *see also Village of Herkimer*, 33 PERB ¶ 4591 (ALJ 2000) (concluding that the union failed to negotiate in good faith where, after signing a memorandum of agreement, it sought to re-open negotiations rather than signing the final bargaining agreement incorporating the terms of the memorandum of agreement).

[7] Under the circumstances of this case, having found that the Union has bargained in bad faith, we need not separately address whether the Union's conduct also constitutes repudiation.

Here, LEEBA had an obligation under the NYCCBL to sign the 2010-2018 Agreement.[8] The City requested that the Union execute the 2010-2018 Agreement in accordance with the 2010-2018 MOA, which establishes that the parties intend "to incorporate the terms of the 2010-2018 MOA into the [2010-2018 Agreement] . . . ." (Pet., Ex. 1) Under these circumstances, the obligation to bargain in good faith includes the obligation to sign the 2010-2018 Agreement.[9] *See* NYCCBL § 12-306(c)(5) (providing that the duty to bargain in good faith includes the obligation "to execute upon request a written document embodying the agreed terms, and to take such steps necessary to implement the agreement").

The totality of the Union's conduct also demonstrates that it attempted to re-open the negotiated, executed, and implemented MOA. Before the Union petitioned to represent the bargaining unit, the MOA had been signed and ratified by LIUNA and the City. As the new certified bargaining representative, the Union became responsible for all of LIUNA's obligations under the MOA and was thus required to accept the contract terms that LIUNA negotiated with the City. *See State of New York,* 5 PERB ¶ 3060 (1972) (explaining that, where the exclusive representative of a bargaining unit changes during the term of a negotiated agreement, "the successor organization is, for all purposes, substituted for its predecessor as representative of the employees in the unit and as administrator of their agreement" for the remaining period of the outstanding agreement); *see also Opinion of Counsel*, 19 PERB ¶ 5006 (1986) ("The newly certified organization assumes the privileges and responsibilities under the existing contract."). That responsibility includes the negotiated term in the MOA wherein the parties agreed not to

[8] LEEBA does not contest that the 2010-2018 Agreement accurately incorporates the terms of the 2010-2018 MOA.

[9] Neither party advances the argument that the language of the MOA, which conditions the final wage increase on a signed 2010-2018 Agreement, effects a party's statutory obligation to implement or execute the agreement.

"make additional economic demands during the term of the 2010-2018 MOA or during the negotiations for the [2010-2018 Agreement]." (Pet., Ex. 1 at § 8) (italics omitted)

Nevertheless, the record shows that the Union attempted to re-establish negotiations over the MOA. Indeed, the Union concedes that it "requested [OLR] to open up new bargaining negotiations." (Pet., Ex. 9) Additionally, the Union now maintains that negotiation over the MOA should have included discussions regarding "how a member can advance to [m]aximum pay" and that such terms should now be included in the 2010-2018 Agreement. (Ans., ¶ 39) However, LEEBA's dissatisfaction with the MOA does not entitle it to revisit terms of a negotiated binding agreement. *See Bd. of Educ. of the City of New York*, 3 PERB ¶ 3095; *Village of Herkimer*, 33 PERB ¶ 4591.

Further evidencing the Union's bad faith are its incorrect representations in the Request for Mediation that the 2010-2018 Agreement was not yet closed. Specifically, the Union asserted that the parties had been "unable to agree on the terms of a collective bargaining agreement" and that the MOA "signed by prior representative local did not . . . end the bargaining process" (Pet., Exs. 5 & 7) Neither statement is true. To the contrary, and as discussed above, the MOA was signed by both LIUNA and the City, and both parties agreed that neither party could make additional economic demands during the term of the agreement In addition, the Union now claims that provisions clarifying when the City must pay unit members the maximum salary available under the pay range – a claim that was the subject of the January 2016 arbitration initiated and prosecuted by the Union – should have been incorporated into the MOA. (*See* Pet., Ex. 11) (grievance asserting that the City had improperly failed to "pay[] [unit] employees . . . the maximum salary set forth in the Agreement"). That grievance was denied. As a result, it appears that the Union is demanding that the City agree to incorporate a benefit that an arbitrator found was unavailable under the MOA.

Our conclusion is unchanged by the Union's claim that it was attempting to negotiate over gainsharing. As discussed above, MOA § 8 forecloses either party from raising additional economic demands during the term of the agreement except insofar as those demands pertain to gainsharing agreements. The Union's demands did not pertain to gainsharing, as defined in the MOA.[10] Even if they did, that would not justify its refusal to sign the 2010-2018 Agreement. The MOA expressly required that the parties' discussion of gainsharing issues end by April 9, 2017. Moreover, the Union's bad faith conduct continued after the period to discuss gainsharing had ended.

In sum, we find that by repeatedly demanding to negotiate economic terms during the term of the closed 2010-2018 contract and refusing to sign the 2010-2018 Agreement, the Union has violated its obligation to bargain in good faith. *See Village of Herkimer*, 33 PERB ¶ 4591. For these reasons, the petition is granted.

[10] The record does not reflect that the Union offered to "identify, review, recommend [or] develop initiatives [to] generate workplace savings, maximize the potential of the City workforce [or] ensure the provision of essential services . . . " (MOA § 7; Pet. Ex. 1)

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 verified improper practice petition filed by the City of New York Office of Labor Relations against the Law Enforcement Employees Benevolent Association, docketed as BCB-4228-17, is granted; and it is further

ORDERED that the Law Enforcement Employees Benevolent Association cease and desist its efforts to renegotiate the terms of the memorandum of agreement, dated May 19, 2015, by and between the Laborers' International Union of North America, Local 1042, Pavers and Road Builders District Council and the City of New York; and it is further

ORDERED that the Law Enforcement Employees Benevolent Association sign a successor unit agreement incorporating the terms of the memorandum of agreement, dated May 19, 2015, by and between the Laborers' International Union of North America, Local 1042, Pavers and Road Builders District Council and the City of New York; and it is further

ORDERED that the Law Enforcement Employees Benevolent Association post the attached notice for no less than 30 days at all locations it uses for written communications with its unit members.

Dated: February 15, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER

OFFICE OF COLLECTIVE BARGAINING

OFFICE ADDRESS
100 Gold Street
Suite 4800
New York, New York 10038

MAILING ADDRESS
Peck Slip Station
PO Box 1018
New York, New York
10038-9991

212.306.7160
www.ocb-nyc.org

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
And in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 11 OCB2d 1 (BCB 2018), determining an improper practice petition between the City of New York Office of Labor Relations and the Law Enforcement Employees Benevolent Association.

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 verified improper practice petition filed by the City of New York Office of Labor Relations against the Law Enforcement Employees Benevolent Association, docketed as BCB-4228-17, is granted; and it is further

ORDERED that the Law Enforcement Employees Benevolent Association cease and desist its efforts to renegotiate the terms of the memorandum of agreement, dated May 19, 2015, by and between the Laborers' International Union of North America, Local 1042, Pavers and Road Builders District Council and the City of New York; and it is further

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ORDERED that the Law Enforcement Employees Benevolent Association post this notice for no less than 30 days at all locations it uses for written communications with its unit members.

Law Enforcement Employees Benevolent Association
(Department)

Dated: _____ (Posted By)
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.