DC 37, 2 OCB2d 1 (BCB 2009)

(IP) (Docket No. BCB-2706-08).

Summary of Decision: The Union alleged that DPR violated NYCCBL § 12-306(a)(1) and (4) when it contracted out the programming, operation and maintenance work at a newly built pool complex to a private contractor. The Union alleged that non-bargaining unit employees were engaged in the identical job duties that DC 37 members would perform and that the contracting out of such work interfered with, restrained and coerced the exercise of DC 37 members' statutory rights. The City contended that the instant improper practice petition is untimely, that the contracted out work to these non-bargaining unit employees has never been exclusively performed by DC 37 members, and that the Union's claims should be deferred to arbitration. The Board found that, although the Union timely filed the petition in the instant matter, the underlying substantive dispute should be deferred to arbitration, pursuant to the provisions within the parties' collective bargaining agreement. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondents.

DECISION AND ORDER

On June 27, 2008, District Council 37, ("DC 37" or "Union") filed a verified improper practice petition, on behalf of affiliated DC 37, Locals 299, 461, 508, 983, 1505, and 1549, against the City of New York ("City") and the New York City Department of Parks and Recreation ("DPR")

alleging that DPR violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (4). The Union claims that DPR's contracting out of work at the Flushing Meadow Pool Complex ("Complex") to a private contractor violated the City's duty to bargain in good faith because the private contractor's employees were engaged in the identical job duties that DC 37 members perform at other DPR pool facilities and would perform if they were employed at the Complex. The Union further alleges that the contracting out of such work by DPR interfered with, restrained, and coerced the exercise of DC 37 members' statutory rights under the NYCCBL. The City contends that the instant petition is untimely as the Union's claims accrued more than four months prior to its filing and that the work contracted out to these non-bargaining unit employees is not and has never been exclusively performed by DC 37 members. The City further argues that the Union's claims should be deferred to arbitration since they involve the interpretation of the parties' collective bargaining agreement, which expressly addresses the issue of privatization of work. We find that, although the Union timely filed the improper practice petition, the underlying substantive dispute should be deferred to arbitration for interpretation of the specific language contained in the parties' collective bargaining agreement to interpret meaning of the provisions that address the issue of privatization of this type of work.

BACKGROUND

DPR is the agency responsible for operating and maintaining 14 miles of beaches and 52 outdoor pools throughout New York City, and DPR employs over 1,000 lifeguards to work at these beaches and pools during the summer season. Additionally, DPR employs "thousands of additional

seasonal employees during the peak . . . months" to work at these various facilities in job titles such as Borough Coordinator, Activity Therapist, Associate Park Service Worker, City Park Worker, and City Seasonal Aide. (Pet. ¶ 11). Employees in these job titles are represented by DC 37, with Local 508 representing the titles of Chief Lifeguard, Borough Coordinator, Assistant Lifeguard Coordinator, and Lifeguard Coordinator; Local 461 representing the titles of Lifeguard and Lifeguard Lieutenant; Local 299 representing Activity Therapist, Fitness Instructor, Recreation Specialist, Playground Associate, and Recreation Director; Local 983 representing the titles City Seasonal Aide, Associate Park Service Worker, Motor Vehicle Operator, and Urban Park Ranger; Local 1505 representing the titles City Park Worker and Park Service Worker; and Local 1549 representing various clerical titles within DPR.

DC 37 and the City are parties to a Memorandum of Economic Agreement, executed on September 24, 2006, which contains specific provisions that address the topics of contracting out of work and dispute resolution ("Agreement"). Agreement § 11, which contains three distinct sub-parts, is entitled "Privatization/Contracting-Out/Contracting-In" and, states, in pertinent part:

> It is the Employer's policy to have advance discussions with the Union to review plans [regarding privatization] which may adversely affect employees covered by [the Agreement]. The Union shall be advised as early as possible, but in no case later than 90 days in advance of the [contracting out or work] of the nature, scope and approximate dates of the contract and the reasons therefor.

(*Id.*). Agreement § 11 also states:

> The Employer will provide the Union as soon as practicable with information [concerning privatization], in sufficient detail, so that the Union may prepare a proposal designed to demonstrate the cost effectiveness of keeping the work in-house. Such information . . . shall include but not be limited to, applicable solicitations of vendors, winning bids, descriptions of services to be provided by vendors, [and] cost comparison analyses.

(*Id.*). This section further provides that:

> Not less than 45 days prior to submission to the Comptroller of a recommendation for the award of the [privatization] contract, the Union shall have an opportunity to make a formal proposal to the Employer demonstrating that it is cost effective or that it is in the best interest of the Employer to continue to perform such work in-house. The Employer agrees to consider such proposal before making a final determination.

(*Id.*).

In Agreement § 14(a), entitled "Resolution of Dispute," the signatories to this contract agreed, subject to subsequent provisions of the Agreement, that "any dispute, controversy, or claim concerning or arising out of the execution, application, interpretation or performance of any of the terms or conditions of this [Agreement] shall be submitted to arbitration upon written notice therefor by any of the parties to this [Agreement] to the party with whom such dispute or controversy exists." (*Id*.). Specifically, §14(c) of the Agreement provides, in pertinent part: "Any dispute, controversy or claim arising under Sections . . ., 11 ("Privatization"), . . . shall continue to be submitted under Section 14(a) above." (*Id*.).

On April 18, 2007, DPR placed a Request for Proposal ("RFP") in the City Record in order to solicit proposals from vendors bidding on a contract to operate and maintain the Complex. DPR further placed this RFP on the City Record On-Line service which allows prospective vendors and contractors to access RFPs via the internet. This particular RFP concerning the Complex stated that DPR was "seeking an appropriately qualified Operator to perform routine maintenance and (provide recreational programming) at [the Complex]." (Ans., Ex. 2). Furthermore, DPR desired "to provide innovative and quality programming such as: water safety instruction, lap swimming, sophisticated aquatic training programs, [and] swim meets." (*Id*.). The "term of the contract(s) awarded from this RFP will be five (5) years from the date of notice to proceed." (*Id*.). Finally, DPR was "seeking an

Operator to maintain and program" the Complex and "be responsible for programming, security, life guarding, water safety instruction, special event management, control of client traffic and customer service." (*Id*.).

According to the City, approximately eight entities including DC 37 downloaded the RFP from the City Record On-Line. On May 23, 2007, DPR sent out a notice to each prospective proposer who downloaded the RFP, including DC 37, that DPR would be extending time to file a proposal. On May 24, 2007, DC 37 met with DPR to discuss the Complex and to object to DPR's contracting out of the work at the Complex. At that meeting, DPR "indicated . . . that no decision regarding contracting out [the work at the Complex] had been made." (Pet. ¶ 12).

By June 8, 2007, the new deadline to submit a proposal, only three entities submitted a proposal; DC 37 was not one of them.[1] On June 27, 2007, DPR's Selection Committee met to review the submitted proposals. On July 24, 2007, almost one month later, this committee "asked each of the prospective contractors to submit their best and final offer." (Ans. ¶ 17). On August 6, 2007, this committee met again to discuss these best and final offers, and, on August 15, 2007, DPR selected the bid from USA Pools of New York ("USA Pools") and awarded them the contract to staff and operate the Complex. However, "for the next two months, DPR placed the contract registration in abeyance in order to discuss alternative staffing options with [DC 37]." (Ans. ¶20).

On September 18, 2007, DPR met with DC 37 "to review different staffing options in lieu of contracting [the Complex] operations to a third party." (Ans. ¶ 36). The Union objected to the

[1] While it is undisputed that DC 37 never submitted a proposal in response to the RFP, even though it had downloaded the necessary information from the City Record On-Line, we take administrative notice that the Union's opportunity to submit a proposal to provide services and employees at the Complex arises under the Agreement, not pursuant to the City's procurement procedures.

manner in which DPR proposed staffing of the Complex, and no agreement was reached on that day. Later, on October 11, 2007, the City and DC 37 again met to discuss this issue. At this meeting, the parties discussed the City's decision to contract out bargaining unit work to USA Pools. DPR proposed that if DC 37 members were to staff the Complex, then they would have to report to a "Center Manager" and "all lifeguards [would have] to teach swimming classes and be trained in the use of defibrillators." (Ans. ¶ 37).[2] At the culmination of the October 11, 2007 meeting, no agreement concerning the employment of DC 37 members at the Complex was reached.

On October 17, 2007, DPR submitted a draft contract between them and USA Pools to the New York City Law Department for its review and approval. This contract was approved on October 30, 2007. Shortly thereafter, on November 2, 2007, DPR placed an advertisement in the City Record announcing that DPR had scheduled a public hearing, to be held on November 15, 2007, "to allow public comment on the proposed contract" concerning the staffing and operation of the Complex by USA Pools. (Ans. ¶ 23). After conducting this hearing, on December 3, 2007, USA Pools signed the contract concerning the staffing and operation of the Complex by USA Pools. This contract was then registered by the Comptroller of the City of New York.

According to the City but disputed by the Union, USA Pools began operations at the Complex on February 22, 2008, and conducted a "grand opening" on February 29, 2008. (Ans.¶ 29). According to the Union, the Complex "opened" on February 29, 2008 at an "opening ceremony" that was attended by a Deputy Mayor, DRP's Commissioner, and the President of USA Pools. (Rep. ¶ 29 and Rep., Ex. B).

---

[2] Though the Union denied these contentions in its Reply, DC 37 never alleged that these duties were outside the scope of the existing job duties of lifeguards or any other prospective employee working at the Complex.

On June 26, 2008, DC 37 submitted a Request for Arbitration to the Office of Collective Bargaining ("OCB"), contending that DPR violated § 11 of the Agreement by contracting out the work at the Complex to USA Pools by "fail[ing] to give the Union sufficient advance notice of the employer's intentions" to contract out the work and "fail[ing] to provide the Union with information to enable the Union to prepare a proposal designed to demonstrate the cost effectiveness of keeping the work in-house." (Rep., Ex. B). The Union further stated that it was seeking arbitration regarding this dispute pursuant to § 14 of the Agreement.

The next day, on June 27, 2008, the Union filed the instant improper practice petition alleging that DPR violated NYCCBL § 12-306(a)(1) and (4) by contracting out the work to USA Pools.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DPR violated NYCCBL § 12-306(a)(1) and (4) by failing to bargain in good faith with DC 37 when it contracted out the work at the Complex to USA Pools.[3] The

---

[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;
* * *
(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. . . .

NYCCBL § 12-305 provides, in relevant 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.

privatization of bargaining unit work is a mandatory subject of bargaining, and the unilateral decision to contract out such work violates the NYCCBL. The type of work being contracted out to USA Pools, up until that point in time, had been exclusively performed by DC 37 members, and there is no evidence that non-bargaining unit employees were performing these job duties. Furthermore, the work that DPR privatized, through its contract with USA Pools, is substantially similar to the work previously performed by DC 37 members, and DPR cannot show that there is a change in services or that this work significantly changed. Therefore, DPR had a duty to bargain over the decision to contract out the work to be performed at the Complex to USA Pools, but did not bargain in good faith, and, as such, has violated NYCCBL § 12-306(a)(1) and (4).

In response to the City's contention that the instant improper practice petition should be dismissed as being untimely, the Union contends that this petition was filed within the four month statute of limitations period set forth in NYCCBL § 12-306(e) and the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") § 1-07(b)(4).[4] The Complex began operations on February 29, 2008, and this petition was filed June 27,

---

[4] NYCCBL § 12-306(e) provides, in pertinent part:

> A petition alleging that a public employer or its agents . . . has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

OCB Rule § 1-07(b)(4) provides:

> One or more public employees or any public employee organization acting on their behalf or a public employer may file a petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the

(continued...)

2008, two days within the applicable four month period in which to timely file an improper practice petition. Although the City argues that DC 37 knew about the RFP and DPR's ultimate decision to contract the work out to USA Pools, the Union's four month statute of limitations does not begin to run until the proposed action actually does occur. Accordingly, the claim in the instant matter did not accrue until February 29, 2008, when the Complex was actually opened and employees from the USA Pools began engaging in work that, until that point in time, had been exclusively performed by and was substantially similar to the work performed by DC 37 members.

The Union rejects the City's argument that DC 37 members did not exclusively perform the work being performed by employees of USA Pools at the Complex, on the ground that its allegations are unsupported by factual evidence. Moreover, assuming *arguendo* that non-DC 37 employees are performing bargaining unit work, the *de minimis* extent of such work does not vitiate the Union's claims. Limited and incidental use of non-bargaining unit employees to perform work at does not strip the Union's employees of exclusivity in the instant matter.

In response to the City's argument that this matter should be deferred to arbitration, the Union initially contended that the issue presented should not be arbitrated because it does not require interpretation of the Agreement and requests a remedy that greatly differs from the one sought under the Union's Request for Arbitration, dated June 26, 2008. However, by a letter dated February 13, 2009, the Union acknowledges that "it would be efficient for the process and for all parties if the matter were deferred to arbitration." (DC 37 Letter, dated February 13, 2009). The Union also noted that the City had not challenged the arbitrability of DC 37's Request for Arbitration and that the

---

[4](...continued)
alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

contractual dispute is pending before an arbitrator.

City's Position

The City argues that the instant petition should be dismissed because it is untimely. Specifically, DPR posted a RFP both in the City Record and on the City Record On-Line as early as April 18, 2007, and this RFP was then downloaded by DC 37 on May 1, 2007. Additionally, DPR met with DC 37 on May 24, 2007 to discuss the potential privatization of the work at the Complex, and then met the Union on at least two other occasions to discuss its tentative selection of USA Pools in September and October 2007. As such, the claim accrued well prior to the February 29, 2008 date of the opening of the Complex, upon which the Union relies. Therefore, the petition in the instant matter was untimely filed.

The City also avers that DPR's decision to contract this work out is not a mandatory subject of bargaining because the Union's members did not exclusively perform the tasks and duties at issue here. Rather, the City can demonstrate that it has been utilizing non-bargaining unit employees at another facility within DPR's authority. Since 1989 at the Asphalt Green pool complex located on the Upper Eastside of Manhattan, DPR has been contracting out such lifeguarding, maintenance, operation, and management work to Asphalt Green, Inc., which is a private, non-profit entity. Accordingly, DC 37 cannot make a claim that its employees exclusively performed programming, security, life guarding, water safety instruction, special event management, control of client traffic, and customer service duties under the authority of DPR. In the absence of exclusivity, no duty to bargain over this issue can be found.

Additionally, the City avers that the instant matter should be deferred to arbitration because the contractual arbitration procedures provide an appropriate means of resolving this dispute.

Furthermore, the resolution of this issue requires interpretation of the Agreement. The Union's claims against DPR arise out of the privatization of the work at the Complex, and § 11 of the Agreement, entitled "Privatization/Contracting-Out/Contracting-In," sets forth the procedures both parties are to follow when such contracting out of work occurs. Moreover, § 14 of the Agreement, entitled "Resolution of Dispute," requires that any disputes concerning Agreement § 11 are to proceed to arbitration. The Union recognized this obligation and, in fact, filed a Request for Arbitration prior to filing the instant improper practice petition. As such, the instant dispute between DC 37 and DPR should be deferred to arbitration and allowed to proceed in that forum.

DISCUSSION

In the instant matter, the Union claims that DPR has violated its duty to bargain in good faith when it contracted out the work to provide programming, security, life guarding, water safety instruction, special event management, control of client traffic and customer service duties at the Complex.

Preliminarily, we address the City's contention that the Union filed the instant improper practice petition in an untimely manner. According to the NYCCBL, a party must file an improper practice charge no later than four months from the date the disputed action occurred. *See* NYCCBL § 12-306(e); OCB Rules § 1-07(b)(4). Where future intended action is stated, but not yet performed, "we have held that a party may choose to await performance of an action and file an improper practice charge within four months after the intended action is implemented." *DC 37*, 1 OCB2d 5, at 51 (BCB 2008) (citing *DC 37, AFSCME,* 47 OCB 61, at 8 (BCB 1991)); *see also SSEU, Local 371*, 1 OCB2d 25 (BCB 2008) (where petitioner appealed the rescission of his promotion, this Board

found petitioner's discrimination claim timely because the agency failed to inform him that his appeal was rejected and the rescission was permanent).

Here, DPR informed the Union that privatization of the work at the Complex was a possibility in May 2007, discussed this issue again in September and October 2007, and selected and finalized a contract with USA Pools in December 2007; all of which fall outside the four month statute of limitations period. Nevertheless, the decision to utilize employees of USA Pools was not implemented until these non-DC 37 employees began operating the Complex, which presents the central substantive issue in the instant matter, on February 29, 2008. Accordingly, the claim accrued on that day, which does fall within the four month statute of limitations period. Therefore, the Union's instant improper practice petition is timely. Moreover, despite DPR's numerous statements of its intent to privatize the work at the Complex, the City was still meeting with and negotiating with the Union over the contracting out of this work, even after DPR selected the bid from USA Pools and awarded it the contract in August 2007. Therefore, we cannot fault the Union for waiting until the Complex actually opened using non-DC 37 employees.

Turning to the merits of the instant petition, the Union claims that DPR violated its duty to bargain in good faith by contracting out work at the Complex that was, and still is, performed by bargaining unit employees at various other facilities under the authority of DPR. Citing the test enunciated in *Niagara Frontier Transportation Authority*, 18 PERB ¶ 3083 (1985), which has been referenced in this Board's decisions beginning in *Communications Workers Association, Local 1180*, 43 OCB 47, at 5 and 13 (BCB 1989), "the subcontracting of bargaining unit work, for economic or other reasons, constitutes a mandatory subject of negotiations . . . where there is no curtailment in the level of services because the decision to contract unit work is inextricably bound to the other

mandatory terms and conditions of employment." *Manhasset Union Free School Dist.*, 41 PERB ¶ 3005 (2008); *see also IUOE, Locals 15 and 14*, 77 OCB 2, at 12-13 (BCB 2006). In response, the City contended that the NYCCBL explicitly provides that employers possess the right to "determine the methods, means and personnel by which government operations are to be conducted." NYCCBL § 12-307(b).[5]

Although both parties, at times, couch the instant matter as involving a claimed violation of NYCCBL § 12-306(a)(4), we need not determine here whether the Union has made the requisite showing under the above-stated analysis. Instead, the City argued, *inter alia*, that this dispute should be deferred to arbitration, and the Union, prior to the issuance of this decision, also acknowledged that it would be "efficient for the process and for all parties" if this matter were deferred to arbitration. (DC 37 Letter, dated February 13, 2009). Accordingly, we analyze the instant matter in light of these parties' stated positions.

With regard to the issue of deferral, this Board has stated that it "has jurisdiction over an alleged breach of contract where the alleged acts would also constitute an improper practice." *DC 37, Local 1508*, 79 OCB 11, at 9 (BCB 2007); *see New York Civil Service Law § 205(5)(d)*; *see also DC* 37, 79 OCB2d 21, at 20-22 (BCB 2007) (the Board is statutorily prohibited from exerting jurisdiction over contract violations, unless the alleged contract breaches also constitute improper practices); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 31 n. 7 (1967). However, we will defer

---

[5] NYCCBL § 12-307(b) provides in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization. . . .

disputes to arbitration "where the circumstances are such that the contractual arbitration procedure provides an appropriate means of resolving the matter, consistent with the declared policy of the NYCCBL to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organization." *DC 37, Local 1508*, 79 OCB 21, at 21 (BCB 2007) (internal quotations omitted). Furthermore, 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." *DC 37*, OCB2d 4, at 8-10 (BCB 2008); *see DC 37, Local 1508*, 79 OCB 11, at 10 (BCB 2007).

In the instant matter, we find that the facts concerning the claimed failure to bargain and the contracting out of bargaining unit work at the Complex are inextricably intertwined with the question raised in the Union's request for arbitration, dated June 26, 2008. As alleged, the grievance raises the questions of whether DPR satisfied its contractual obligations under § 11 of the Agreement, and more specifically, whether DPR failed to provide the Union with sufficient "advance notice" of DPR's intentions to privatize the work at the Complex and with "information to enable the Union to prepare a proposal designed to demonstrate the cost-effectiveness of keeping the work in-house." (Rep., Ex. 2). These issues require examination of the actions of DC 37 and DPR and the interpretation of the specific contractual provisions contained in the Agreement as they apply to the parties' actions.

Accordingly, we "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." *SSEU, Local 371*, 1 OCB2d 20, at 12 (BCB 2008) citing N.Y. Civ. Serv. Law § 205.5(d). "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." *Id.*; *see also DC 37*, 79 OCB 11, at 10 (citing *IBT, Local 237*, 61 OCB 31 (BCB 1998)). Moreover, § 14 of the Agreement specifically provides that any dispute concerning § 11 of the Agreement would be submitted to "arbitration upon written notice therefor by any of the parties to this [Agreement] to the party with whom such dispute or controversy exists." (Ans., Ex 9). DC 37 has submitted such dispute to arbitration, and the City has not challenged the arbitrability thereof. Accordingly, we defer the instant dispute concerning the privatization of bargaining unit work performed at the Complex to arbitration. The deferral is "without prejudice to reopen the charge should the City raise during the arbitration any argument that forecloses a determination on the merits of the grievance or should any award be repugnant to rights under the NYCCBL." *DC 37*, 77 OCB 23, at 13 (BCB 2006); *see Comm. of Interns and Residents, SEIU*, 67 OCB 40, at 7 (BCB 2001).

Since the Union has already filed a Request for Arbitration and an arbitrator has been selected mutually to decide this contractual dispute, we leave the parties to pursue their claims and defenses in that particular forum.

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 filed by District Council 37, docketed as BCB-2706-08, and the same hereby are, deferred to the parties' grievance/arbitration process.

Dated: New York, New York
April 22, 2009

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PETER PEPPER
MEMBER