Local 1157, 2 OCB2d 10 (BCB 2009)

(IP) (Docket No. BCB-2656-07)
(IP) (Docket No. BCB-2660-07).

Summary of Decision: Local 1157 and DC 37, in separate petitions, alleged that the City made unilateral changes to annual leave, sick leave, and leave regulation accruals for employees in the title of Supervisor Highway Repairer, in violation of NYCCBL § 12-306(a)(4) and (5). Petitioners also alleged that the changes stemmed from anti-union animus, in violation of NYCCBL § 12-306(a)(1) and (3), and that the changes violated § 12-306(a)(2). In an earlier determination, the Board dismissed Local 1157's bargaining claims because it lacked standing. The Board found that it did not have jurisdiction over the Unions' claims that the City failed to bargain in good faith, and even if it did have jurisdiction over the remainder of the claims, those claims are not yet ripe for adjudication. ***(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-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

CITY OF NEW YORK,

Respondent.

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 alleged that the City unilaterally effectuated 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 violated § 12-306(a)(5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). On October 10, 2007, District Council 37, AFSCME, AFL-CIO ("DC 37") filed a separate verified improper practice petition and request for injunctive relief regarding the same set of facts.

The City argued that Local 1157 lacked proper standing to bring a claim under the NYCCBL since Local 1157 had filed without the authorization or consent of DC 37, the holder of the bargaining certificate. The City also claimed that, in any event, the Unions failed to establish that the City violated any provision of the NYCCBL. At the request of the Board, DC 37 submitted a letter stating their position on the issue of standing, which was that Local 1157 lacked the requisite standing to bring a claim with regard to NYCCBL § 12-306(a)(5). On October 22, 2007, Local 1157 filed an amended improper practice petition to state claimed violations of NYCCBL § 12-306(a)(1), (2), and (3).

Both requests for injunctive relief were denied by the Board on October 25, 2007. In a subsequent Interim Decision and Order, *Local 1157, DC 37*, 1 OCB2d 7 (BCB 2008), the Board found that Local 1157 lacked the requisite standing to bring a claim under NYCCBL § 12-306(a)(4) or (5) but reserved a determination on its claims that the City violated § 12-306(a)(1), (2), and (3). In this determination, which consolidates the Local 1157 and DC 37 petitions, the Board finds that

it does not have jurisdiction over the Unions' claims that the City failed to bargain in good faith and, that whether it has jurisdiction over the remainder of the Unions' claims, those claims are not yet ripe.

BACKGROUND

Local 1157 is a constituent part of DC 37 that includes as members individuals employed in the title SHR. On February 2, 1978, the Board of Certification determined 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, Highway Repairers, and Highway Repairers (CETA) employed by the City. *DC 37*, 22 OCB 2 (BOC 1978). The title Foreman Highway Repairers was changed to SHR in 1982. DC 37 was the union signatory to SHRs' last signed agreement, 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 New York Labor Law § 220 ("§ 220"). Accordingly, these employees are paid wage rates and supplemental benefits that track the wage rates and supplemental benefits received by the private sector in the same job classifications. 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.[1] 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. The local

[1] 1984 New York Laws, chapter 767, amending Labor Law § 220.8-d.

fiscal officer who determines the rates for SHRs is the New York City Comptroller ("Comptroller"). 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.

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."

The last negotiated agreement covering SHRs was a Consent Determination covering the period of April 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 its 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 of 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. Local 1157 claims that at the December 8 meeting, the City took the position that SHRs were not covered by § 220, and rejected the Comptroller's preliminary determination. Local 1157 asserts that the City announced that, accordingly, it would negotiate 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 ("Order") 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:
>
> 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 in *Matter of Hanley v. Thompson*, 41 A.D.3d 207 (1st Dept 2007).

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 the New York City Office of Labor Relations ("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).[2] 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

[2] Article III is entitled, "Other Absences with Pay."

> 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 paid 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.

As a remedy, DC 37 asks that the Board order that the City cease and desist from any unilateral change in the annual, sick, and leave regulation balances of Local 1157 members in the title of SHR, cease and desist from discriminating against the Union members in exercise of their rights protected by the NYCCBL, and post appropriate notices at the Respondent's facilities and work sites.

As a remedy, Local 1157 requests 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 Determination is agreed upon and in effect; and make every SHR whole for any loss or reduction in benefits they have suffered.

Local 1157 and DC 37 filed their verified requests for injunctive relief petitions, which the Board dismissed on October 25, 2007. The Board dismissed Local 1157's claims that the City violated NYCCBL § 12-306(a)(4) or (5) in *Local 1157, DC 37,* 1 OCB2d 7 (BCB 2008), but did not reach Local 1157's claim that the City violated § 12-306(a)(1), (2), or (3), or address any of DC 37's claims.[3] We now turn to the remaining issues.

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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 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.

POSITIONS OF THE PARTIES

DC 37's Position

DC 37 contends that the City unilaterally determined leave accrual recalculations, stated that SHRs would no longer be eligible for leave regulation benefits, announced that it would unilaterally determine how much over-accrued leave each SHR owed the City and would tell DC 37 when the over-accrued leave would be debited from SHRs' existing leave balances. The subjects of annual leave, sick leave, and other leaves, such as bereavement leave are mandatory subjects of bargaining, and bargaining over such subjects is expressly set forth in NYCCBL § 12-307.

DC 37 further contends that the City has engaged in a patently frivolous course of conduct designed to wear down the Union and punish it for asserting its rights under § 220. The City's conduct is further designed to discourage other union members from asserting their rights under § 220.

Subsequent to the Appellate Division decision, DC 37 argues that it met with the City to negotiate the implementation of the Comptroller's determination. However, instead of negotiating, DC 37 was presented with a costing analysis, in which the City unilaterally determined that it would "recoup" what it deemed overpayments in the supplements. Such a recoupment is not legally required and is inconsistent with the manner in which it negotiated with other prevailing rate unions represented by DC 37. In light of all of the above, DC 37 argues that the City has violated NYCCBL § 12-306(a)(1), (2), (3), (4), and (5).

In response to the City's claims that the Board lacks jurisdiction over this dispute because it involves § 220, DC 37 claims that after the final determination was issued and no further appeals were taken by the City, the City unilaterally determined the means by which accruals would be

modified. These changes were made with no consultation or negotiation with DC 37. The parties did not engage in a back-and-forth dialogue as to whether it might be better to reduce more vacation time and less sick time or to reduce, but not eliminate leave regulation days. The City unilaterally determined how the vacation/sick/leave regulation days would be modified. This unilateral action, over what is a clear mandatory subject of bargaining, is a violation of the NYCCBL.

Further, contrary to the assertions by the City, a union does not surrender its rights under the NYCCBL when it files a labor law complaint and pursues its rights under § 220. While the Board does not have authority to consider the merits of the Comptroller's determination, claims of improper practice are cognizable. Thus, DC 37 requests a finding that the City's unilateral determinations regarding the accrual modification be deemed a violation of the NYCCBL. Additionally, the Board does have jurisdiction over the claimed violations of NYCCBL § 12-306(a)(1) and (3) because DC 37's actions were related to the employment relationship and were in furtherance of the collective welfare of employees, which constitute protected activity under the NYCCBL.

Local 1157's Position

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 § 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.

Local 1157 claims that retaliatory motive can be inferred by the City's unyielding refusal to admit that SHRs have any rights under § 220 and by statements made by the OLR Commissioner and Deputy Commissioner at meetings in 2004 and 2005. According to Local 1157, in 2004, the OLR Commissioner stated that the City would prolong the § 220 enforcement proceeding for years if the Union rejected the Citywide pattern bargaining and pursued their rights under § 220. Also, the City would take other punitive actions if the Union prevailed in the § 220 proceeding, including converting the SHR position to a seasonal position, outsourcing SHRs' work, and reclassifying the SHR title to non-prevailing rate status. The Union asserts that in July 2005, the OLR Deputy Commissioner repeated these threats.

City's Position

The City argues that the improper practice petitions must be dismissed as Petitioners failed to establish that the City has violated NYCCBL § 12-306(a)(1), (2), (3), (4), or (5). Petitioners have raised an improper practice claim as it relates to wages and supplements. SHRs are employees who fall under § 220. As such, terms relating to wages and supplements for SHRs are subject only to the terms of § 220 and are not mandatory pursuant to the NYCCBL. Therefore, the Board cannot find that the City violated § 12-306(a)(4) or (5).

Furthermore, Petitioners also fail to demonstrate that the City has violated NYCCBL § 12-306(a)(1) or (3) because they cannot demonstrate that the City has retaliated against the Union. The City has not taken any action against the Union, but as the facts have established, the City has merely implemented the terms of the Comptroller's Determination. The City denies that the OLR Commissioner and Deputy Commissioner ever threatened the Union in 2004 or 2005, and to the extent that those statements were offered as proof in support of Local 1157's claims, they are

untimely and warrant dismissal.

Assuming for the sake of argument that the City's actions appear discriminatory against employees in violation of § 12-306(a)(3), the instant claim must fail, as the City's actions in implementing the Comptroller's Determination constitute a legitimate business reason. Finally, any claim that the City has violated § 12-306(a)(2) is conclusory and speculative.

DISCUSSION

Preliminarily, the question whether to consolidate similar cases for decision usually rests solely within the discretion of the decision-making body, whether an administrative agency or court. *Local 621, SEIU,* 67 OCB 2, at 13-14 (BCB 2001); *see PBA,* 10 OCB2d 14, at 12 (BCB 2008); *LBA and SBA*, 51 OCB 45, at 19-22 (BCB 1993). As in our prior cases in which consolidation was deemed appropriate, here there are parties and issues of fact that are common to both cases, which both involve the same employer and the same facts, the only difference between them being that the change in question is challenged by different parties. *Id.* Therefore, we consolidate the cases in the interest of administrative economy.

Moving to the substantive matters at hand, we shall first discuss DC 37's claims that the City violated NYCCBL § 12-306(a)(4) and/or (5) by making unilateral changes to SHRs' annual leave, sick leave, and other paid leave. Under the NYCCBL, an employer's duty to bargain with respect to employees subject to § 220 is treated as an exception to the general rule set forth in § 12-307(a). NYCCBL § 12-307(a)(1) provides in relevant part that:

> public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits,

> uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) [and] working conditions . . . except that:
>
> (1) with respect to those employees whose wages are determined under section two hundred twenty of the labor law, the duty to bargain in good faith over wages and supplements shall be governed by said section. . . .

Under this section, therefore, issues of the duty to bargain over "wages and supplements" are governed by § 220 and not the NYCCBL, and thus are excluded from our jurisdiction. However, we also have held that a public employer generally has a duty under the NYCCBL to bargain over the working conditions of § 220 public employees which do not involve "wages" or "supplements." *Local 237, City Employees Union, IBT,* 67 OCB 37, at 6 (BCB 2001); *see DC 37,* 25 OCB 29, at 5 (BCB 1980). In our previous cases, we have defined the term "wages" as including wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums. *Local 237, City Employees Union, IBT,* 67 OCB 37, at 6; *see, e.g., Committee of Interns and Residents*, 49 OCB 22, at 13-14 (BCB 1992). Section 220.5-b describes "supplements" as "remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay[,] life insurance, and apprenticeship training."

In *Local 237, City Employees Union, IBT,* 67 OCB 37, the Union claimed that the City failed to bargain in good faith over the allocation of prevailing wage and benefit rates established by the Comptroller in a § 220 proceeding. In dismissing the improper practice petition, the Board explained:

> We conclude that, in the context of this case, the term "wages" includes the allocation of funds which are derived from prevailing rates that are the subject of negotiations as required under Labor Law § 220. Whether that money is allocated to one category or another of wages and benefits, or to supplements, the result of the allocation has an impact on the financial resources of the City and the paychecks of the employees at issue, not on the conditions under which employees perform their official duties.

Local 237, City Employees Union, IBT, 67 OCB 37, at 6.

We find that although the facts of *Local 237* differ from those herein, as noted by the dissenting Board members, the principles stated there are equally applicable to the present matter. The parties' duties regarding bargaining over wages and supplements for § 220 employees are laid out in the Labor Law. An examination of the plain language of subdivision 8-d of § 220 establishes a duty to bargain in good faith for an agreement with respect to wages and supplements. The source of this duty is the Labor Law, not the NYCCBL, a fact which is also recognized in the express language of NYCCBL § 12-307(a)(1).[4] Additionally, the remedy for any breach of the duty to bargain regarding § 220 employees' wages and supplements is set forth in the Labor Law. Indeed,

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[4] We note that from its enactment in 1972 (1972 Local Law No. 1) until its amendment in 1998 (1998 Local Law No. 26), NYCCBL § 12-307(a)(1) provided that:

> with respect to those employees whose wages are determined under section two hundred twenty of the labor law, there shall be no duty to bargain concerning those matters determination of which is provided for in said section. [Emphasis added.]

The legislative history shows that when § 12-307(a)(1) was amended in 1998 to its present form, the intent was to harmonize the NYCCBL with the Labor Law, § 220.8-d of which had been amended by the State Legislature (L. 1983, c. 447) to authorize, in cities of one million or more, the negotiation of wages and supplements by certified employee organizations and public employers, and to provide that, failing agreement, the certified employee organization, alone, could file a complaint with the Comptroller seeking a prevailing wage determination. *See Statement of OCB Director in Support of NYCCBL Amendments* (May 28, 1998) at 6, filed with the City Council in support of Intro No. 235-A of 1998 (enacted as 1998 Local Law No. 26). There is no evidence of any intention to create a duty to bargain beyond that set forth in § 220.8-d of the Labor Law.

§ 220.8-d states that the employer and public employee organization shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements of the laborers, workmen, or mechanics in the title. Continuing on, it states that if the parties fail to achieve an agreement, the Union may file a complaint under § 220.7 of the Labor Law. Furthermore, § 220.9 provides that:

> When a final determination has been rendered, any person, or corporation that wilfully refuses thereafter to pay the rate of wages or to provide the supplements determined to be prevailing . . . determined by said order until modified by order of the fiscal officer or court and thereby violates the provisions of this section shall be guilty of a misdemeanor and upon conviction, shall be punished. . . ."

The remainder of the section lays out, in detail, the penalties for an employer's failure to comply with the provision.

As the accrual of sick leave and vacation leave and paid leave regulations are non-monetary remuneration, the changes at issue fall within the definition of supplements in § 220.5-b, for which the duty to bargain and a mechanism for its enforcement sound not in the NYCCBL but rather in the Labor Law. *Local 237, City Employees Union, IBT*, 67 OCB 37, at 6. Since there is no assertion that this unilateral change had an impact upon other terms and conditions of employment, there is no basis for this Board to exercise jurisdiction over these claims.

Although both Unions point to *New York State Public Employment Relations Board v. Bd. of Educ. of the City of Buffalo*, 39 N.Y.2d 86 (1976) *("City of Buffalo"*) in support of their contention that the Board has jurisdiction over this matter, we find their argument unavailing. In *City of Buffalo*, the Court of Appeals had before it a claim that the Board of Education of the City of Buffalo "unilaterally adopted a resolution placing its skilled trade employees in graded civil service status and establishing specified wage grades with annual salaries," and in so doing violated

§ 209-a of the Civil Service Law, the provision of the Taylor Law cognate to NYCCBL § 12-306(a). 39 N.Y.2d, at 92. In affirming the remedy awarded by the Public Employment Relations Board ("PERB"), the Court found that the City had failed to appeal PERB's determination, and that its challenge to the administrative determination was untimely. Moreover, as the City had removed the affected employees from prevailing wage status, any claim that such status could be invoked to debar jurisdiction was one that the employer was not well situated to raise. In any event, nothing in *City of Buffalo* purports to address the question of PERB's jurisdiction over bargaining issues as they relate to § 220 employees, and certainly nothing in that decision suggests that we are free to disregard the legislative mandate of § 220. In short, we find that Petitioners have failed to put forth a viable basis for this Board to exercise jurisdiction over a failure to bargain claim.

Moving to the Unions' claims that the City violated NYCCBL § 12-306(a)(1) and (3) by retaliating against them for Union activity, we find that even assuming this Board has jurisdiction over this claim, the claims are premature. Issues before this Board must be addressed in the context of an actual controversy, and not in the abstract. *Doctor's Council*, 49 OCB 28, at 18 (BCB 1992); *State of New York (Office of Mental Health)*, 24 PERB ¶ 3004, at 3005 (1991). Both Petitioners claim that the City unilaterally adopted its interpretation/costing of the Comptroller's Order as a means of punishment or retaliation for their union-related activity. The City counters by claiming that it implemented the Order properly, in order to avoid enforcement proceedings against it. Since the Comptroller has not yet determined whether the City's implementation of the Order comported with the Comptroller's intent in rendering it, this dispute is not ripe for decision, assuming the

Unions' actions constitute protected activity under our statute, and we have jurisdiction.[5] Until the Comptroller issues such a determination, we have no basis to find that adverse employment action has occurred. So, too, are any claims that the City violated § 12-306(a)(1) independently, or § 12-306(a)(2). Therefore, we dismiss this portion of the claim without prejudice to re-file an improper practice with this Board, should either Union receive a determination from the Comptroller that the City implemented his Order in a manner that was not substantially in accordance with his intent.

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[5] In order for a petitioner to show that an employer retaliated against an employee/public employee organization, the Board utilizes the *Salamanca-Bowman* test. A petitioner must demonstrate that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. the employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 16-17; *see also DC 37*, 1 OCB2d 6, at 27 (BCB 2008).

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct. *See UFA,* 1 OCB2d 10, at 20 (BCB 2008)*; Local 237, CSBA,* 71 OCB 5, at 9 (BCB 2003).

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 petitions filed by Local 1157 in the matter docketed as BCB-2656-07 be, and the same hereby is, dismissed in all respects, and it is further

ORDERED, that the improper practice petition filed by District Council in the matter docketed as BCB-2656-07 be, and the same hereby is, dismissed in all respects, and it is further

ORDERED, that the petitions are dismissed without prejudice for either Union to re-file an improper practice with this Board, should either receive a determination from the Comptroller that the City implemented the Order in a manner that was not substantially in accordance with his intent.

Dated: New York, New York
March 9, 2009

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent.

GABRIELLE SEMEL
MEMBER

I dissent.

CHARLES G. MOERDLER
MEMBER

DISSENTING OPINION OF LABOR MEMBERS
GABRIELLE SEMEL AND CHARLES G. MOERDLER

With all due respect, the majority's decision in the instant case is flawed. First, it unduly restricts this Board in determining whether there has been a violation of the New York City Collective Bargaining Law ("NYCCBL"). Second, contrary to the majorities' holding, there is no means by which, under the Section 220 of the Labor Law, a union can seek redress for a unilateral change by an employer as a result of a Comptroller's determination. Third, this decision is inconsistent with prior decision of this Board which recognized that prevailing rate employees must be afforded the protections of the NYCCBL, and which limited the instances wherein the Board would not take jurisdiction

In the first instance, I disagree with the majority's decision not to assert jurisdiction in this matter. The union herein is asking the Board to find that the City of New York unilaterally and unlawfully changed terms and conditions of employment. Making such a determination is one of the fundamental duties with which this Board is charged. In this case, it is undisputed that the union availed itself of its right under Section 220 of the Labor Law to ask the Comptroller of the City of New York to conduct an investigation and make a determination as to the prevailing rate of wages and supplements for employees in the title of Supervisor Highway Repairer. After a lengthy process which entailed an investigation by the Comptroller and a hearing before the Office of Administrative Trials and Hearings, the Comptroller issued a final determination, which the City appealed to the Appellate Division, First Department. After the Appellate Division upheld the Comptroller's Determination, the City did not seek to appeal to the Court of Appeals and the determination as to

wages and supplements became final. It was at this juncture that the process provided for under Section 220 of the Labor Law was exhausted. Nevertheless, the work of the City and the Union was not done, and the parties were required to meet and negotiate any adjustment necessary to the benefit package enjoyed by the SHRs so that the value of the benefit package would jibe with the value of the supplement rate determined by the Comptroller. However, instead of negotiating in good faith, as the NYCCBL requires, the City informed the Union that it had unilaterally determined that it would make certain specific adjustments to the annual leave, sick leave and leave regulation days. It is noteworthy that the union did not contest the fact that adjustments would be necessary. Indeed, the union did not challenge the values placed on certain items by the City. The essence of this charge is that the union challenged, as it must, the City deciding which days and how many days would be changed in order to arrive at a reconciliation of the value of the city benefit package and the supplement rate issued by the Comptroller.

It is axiomatic that the New York City Board of Collective Bargaining has exclusive, non-delegable jurisdiction to determine whether a violation of the NYCCBL has occurred. This Board has "exclusive, non-delegable jurisdiction to hear improper labor practice claims" arising under the NYCCBL, as mandated by Civil Service Law § 205(5)(d). *Patrolmen's Benev. Ass'n. v. City of New York*, 293 A.D.2d 253 (1st Dept. 2002); *Uniformed Firefighters Ass'n. v. City of New York*, 79 N.Y.2d 236, 239 (1992); *see* NYCCBL § 12-309(a)(4). . In the instant matter, the union has called upon the Board to determine whether the City committed an improper practice when it altered leave days – a mandatory subject of bargaining As such, the Board is bound to issue a ruling in this matter. Basic tenets of statutory construction mandate such a result. It is well settled that statutes must be interpreted broadly so as to effectuate the purpose of the law (*See eg.* McKinney's Statutes

Section 96, which provides "(A) basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute."). In the instant case, that principle is ignored and the union is left without a remedy available only through the exclusive jurisdiction of this Board.

Further, the clear and unambiguous language of Section 220(8-d) requires the City to bargain in good faith with the certified bargaining representative and references the Taylor Law "or a local law enacted thereunder [i.e. NYCCBL]." Prior to the enactment of 220(8-d) bargaining unit members in prevailing rate titles could file individual complaints with the Comptroller. Section 220(8-d) shifted the right to bring a prevailing rate claim from the individual to the certified bargaining representative and was enacted to grant the certified bargaining representative control over the process by which wages and supplemental benefits are determined. The statute also requires the employer and employee organization to bargain in good faith. As stated above, the NYCCBL grants the Board of Collective Bargaining exclusive jurisdiction over issues of good faith bargaining. Section 220(8-d) does not limit nor otherwise restrict the certified bargaining representative rights' under the NYCCBL. On the contrary, it was enacted to give the certified bargaining representative control over these rights.

Moreover, the majority's reliance upon its prior decision in 67 OCB 37 (BCB 2001) is misplaced. In that case, the union filed a failure to bargain charge on behalf of a group of prevailing rate employees after the union sought to negotiate a successor collective bargaining agreement on behalf of those employees. The Board declined jurisdiction because NYCCBL § 12-307a(1) provides that, subject to the provisions of subdivision b of this section and subdivision c of § 12-304 of this chapter:

> public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) [and] working conditions . . . except that:
>
> (1) with respect to those employees whose wages are determined under section two hundred twenty of the labor law, the duty to bargain in good faith over wages and supplements shall be governed by said section.

Looking then to Section 220 of the Labor Law, we see, as previously noted, that the law requires the parties to engage in good faith bargaining, and if they cannot come to an agreement, the Union may file a complaint under § 220.7 of the Labor Law. Thereafter, the process previously outlined ensues. That was the process suggested by the Board in 67 OCB 37 (BCB 2001). The case here is quite different. First, the process outlined in the Labor Law had been exhausted. Unlike the union in 67 OCB 37 (BCB 2001), District Council 37 and its affiliated Local 1157 is not seeking to bargain a new agreement – it knows what the wage and supplement values are; they have been determined by the Comptroller. What the union seeks in the instant case is some assurance that after the union has availed itself to its remedies under Section 220 of the Labor Law, the City will not unilaterally determine how the wages and supplements determined by the Comptroller will be effectuated – especially when to do so will result in the alteration of long standing benefits with no negotiation with the certified bargaining representative. There is simply no mechanism in the Labor Law which would address the situation herein or redress the unilateral change in a term and condition of employment. There is no direction given to the parties as to how the Comptroller's final determination is to be implemented. In light of this silence, the only possible course is one

which requires the parties to engage in good faith bargaining under the NYCCBL. To decline to take jurisdiction, the Board abdicates its responsibility to ensure that such situations occur.

Moreover, this ruling is inconsistent with prior Board rulings which have indicated that it would take jurisdiction. For example, 37 OCB 45 (BCB 1986), the Union filed a charge concerning the City's unilateral change in terminal leave payments. The Board did not dismiss the case for lack of jurisdiction, but deferred determination because the union had filed a grievance on the matter. In 43 OCB 10 (BCB 1989), this Board entertained (though dismissed) a charge by a prevailing rate union that the City failed to bargain in good faith when it refused to entertain a demand for parity with another group.

In sum, in this dispute, I believe the Board has construed its own powers far too narrowly, and in so doing, has ignored the purpose for which it was created and the policy which it is charged to uphold.

Accordingly,
We dissent.
Gabrielle Semel
Charles G. Moerdler