DC 37, 2 OCB2d 8 (BCB 2009)

(IP)(Docket No. BCB-2489-05).

Summary of Decision: After an arbitrator issued an opinion and award in a matter that the Board had deferred to arbitration, the Union requested that the Board reassert jurisdiction over the improper practice allegation. The Union argued that deferral does not require that a party waive its rights under the NYCCBL and that the arbitrator did not decide the issues in the improper practice claim. The City argued that the Board should not reassert jurisdiction because the arbitrator reached the merits of the case presented to him and reached the underlying case before the Board. The Board found that the arbitrator reached the matter at issue in the improper practice and that his opinion and award was not repugnant to rights under the NYCCBL. Accordingly, the Board denied the Union's request that it reassert jurisdiction over this matter. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1508,

Petitioner,

- and -

NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, and THE NEW YORK CITY OFFICE OF LABOR RELATIONS,

Respondents.

DECISION AND ORDER

On June 24, 2005, District Council 37, Local 1508 ("DC 37" or "Union") filed a verified improper practice petition against the New York City Department of Parks and Recreation ("DPR" or "City") and the New York City Office of Labor Relations. The petition alleged that DPR

unilaterally changed the way in which it implemented its promotional policies and refused to provide the Union with certain documents related to the interview process and thereby violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City denied that DPR made unilateral changes to its promotional procedures for the title Park Supervisor, Level II ("PS II") and also denied that the documents in question were necessary to contract administration. In a decision issued on July 6, 2006, the Board of Collective Bargaining ("Board") granted the petition as regarding the information request, and deferred the remaining issues for a determination by an arbitrator. An arbitration hearing was held and an opinion and award was issued on August 18, 2008, in which the grievance was denied. On November 25, 2008, the Union requested that the Board reassert jurisdiction in this matter. We find that the arbitrator reached the underlying matter at issue in the improper practice petition and that his opinion and award was not repugnant to rights under the NYCCBL. Accordingly, the Union's request that we reassert jurisdiction over this matter is denied.

BACKGROUND

In the prior decision in this matter, *DC 37,* 77 OCB 23 (BCB 2006), the Board was presented with two improper practice charges arising out of DPR's hiring process for PS II positions. The Union alleged that DPR violated the NYCCBL by unilaterally changing the process by which PS II positions were filled and by refusing to provide the Union with individual score sheets used during interviews for PS II positions. The Board granted the Union's petition in part, finding that "the individual score sheets created by DPR's panel to advance employees to the PS II level are relevant

and reasonably necessary for the Union to administer the contract," and therefore the City violated NYCCBL § 12-306(a)(1) and (4) by refusing to provide the Union with the requested documents. Based on that finding, the Board required that DPR provide those documents to the Union.

Regarding the unilateral change claim, according to the Union, "DPR had a long-standing procedure" which "as embodied in the 1986 Agreement and 1993 Agreement, ensured fairness to permanent PSs, who would not be passed over in favor of provisional PSs with lower underlying civil service titles." *DC 37,* 77 OCB 23, at 7-8. In July 2004, DPR adopted the Policy for Posting and Filling Job Vacancies (Revised) ("Policy"), which was the same policy later at issue before the arbitrator. The Policy provided among other things:

> that an Equal Employment Opportunity ("EEO") Advisor may observe interviews but not participate in the interview panel's deliberations; that all members of the recommending panel must fill out their own individual rating sheets for all candidates; and that at the conclusion of the interviews, the recommending panel must meet to discuss the interview ratings and make a final recommendation as to which applicant is best qualified for the job vacancy. Following the recommendations, the selecting official is permitted to use the "1 in 3" rule as used in interviews for candidates on a civil service list.

Id. at 4-5. The Union claimed DPR violated the parties' collective bargaining agreement and agreements reached in 1986 and 1993 by failing to follow the Policy's procedures for posting and filling PS II positions. In addition, according to the Union, DPR told the Union that it would fill promotional vacancies for the PS II position with permanent Park Supervisor I ("PS I") employees before hiring employees with lower civil service titles. In addition to its improper practice charges, the Union filed a grievance alleging that DPR had failed to follow the above policy.

In addressing the unilateral change allegations, the Board found that "[t]he pivotal issue in both the improper practice and the arbitration is whether the City utilized procedures for filling job

vacancies for PS II differently from the way the procedures are written." *DC 37,* 77 OCB 23, at 12. The Board further stated that "[t]he basis of the Union's unilateral change claim – that DPR failed to implement policies granting preference to PS I employees seeking advancement to the PS II level – was derived from the parties' collective bargaining agreement, which defines a grievance as, among other things, a misinterpretation of an employer's written policy, and from the parties' 1986 and 1993 negotiated policies." *Id.* at 12-13.

Based on clear Board precedent, the Board held that it was for an arbitrator to determine whether DPR misinterpreted the Policy. Furthermore, the Board "le[ft] to an arbitrator the interpretation of the negotiated 1986 and 1993 Agreements . . . and the appropriate construction of these Agreements along with the Policy." *Id.* at 13. The Board stated that "when, as here, a claim under [NYCCBL] § 12-306(a)(4) that a public employer changed a policy on a mandatory subject without bargaining also involves a matter that is arguably covered by a negotiated agreement and the claim under the NYCCBL could be resolved in the arbitral process, this Board will defer to arbitration." *Id.* at 11 (citing *CSBA, Local 237,* 71 OCB 24, at 11 (BCB 2003)). Finally, the Board also stated that "[t]he 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." *Id.* at 13 (citing *Comm. of Interns and Residents, SEIU,* 67 OCB 40, at 7 (BCB 2001)).

Thereafter, pursuant to the Union's grievance and consistent with the Board's Order, a hearing was held before an arbitrator. The arbitrator issued an opinion and award on August 18, 2008. The stipulated issue was "[w]hether the Department of Parks and Recreation failed to follow its July 2004 *Policy for Posting and Filling Job Vacancies in the appointment of Park Supervisors*

Level I to positions in the title of Park Supervisor, Level II." (Arbitration Award, dated August 18, 2008, at 2) (emphasis in original). The arbitrator then denied the grievance. The arbitrator's analysis of this issue involved three questions: 1) whether DPR erred by not giving PS I employees preference over provisional employees; 2) whether DPR's use of the 1-in-3 policy violated the 2004 Policy; and 3) whether DPR's involvement of EEO officers in the interview process violated the 2004 Policy. On all points, the arbitrator found no violation of the 2004 Policy.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the arbitrator's examination was limited to an alleged contractual violation concerning particular grievants. Thus, the arbitrator's opinion and award did not address whether DPR unilaterally created the Policy without negotiating with the Union. While the Board declines jurisdiction over improper practice claims related to collective bargaining agreements or "mutually agreed-upon policies," the Union asserts that the Policy at issue here was not mutually agreed upon. (Union Letter, dated January 26, 2009, at 2) (citing *City Employees Union, Local 237, I.B.T.*, 77 OCB 24, at 15 (BCB 2006)). Therefore, the Board should reassert jurisdiction over the Union's claim that the Policy was unilaterally instituted in violation of the NYCCBL.

City's Position

The City argues that the arbitrator reached the merits of the case presented to him and on the underlying case before the Board. Therefore, the matter has been fully resolved, and the Board should not reassert jurisdiction.

DISCUSSION

As we stated in our earlier decision in this matter, this Board reserved the right to reopen the matter deferred to arbitration, upon request, should either of the following occur: "the City raise[s] during the arbitration any argument that forecloses a determination on the merits of the grievance or . . . [the] award [is] repugnant to rights under the NYCCBL." *DC 37,* 77 OCB 23, at 13 (citing *Comm. of Interns and Residents, SEIU,* 67 OCB 40, at 7). The Public Employment Relations Board ("PERB") has enunciated a standard under which it will defer to an arbitration award in an improper practice proceeding if it is satisfied of the following:

> that the issues raised by the improper practice charge were fully litigated in the arbitration proceeding, that arbitral proceedings were not tainted by unfairness or serious procedural irregularities and that the determination of the arbitrator was not clearly repugnant to the purposes and policies of the Public Employees Fair Employment Act.

New York City Transit Auth., 4 PERB ¶ 3031, at 3670 (1971). *See Niagara Falls Housing Auth*., 41 PERB ¶ 4594, at 4800 (2008) (administrative law judge dismissed a charge after finding deferral appropriate under the *New York City Transit Auth.* standard); *see also City of Cohoes,* 37 PERB ¶ 4508, at 4554 (2004).

In this case, the arbitrator found that DPR's promotional procedures remained consistent with the Policy, thereby reaching the underlying issue of whether a unilateral change had occurred. The Union characterized our prior decision as providing that the Board "would defer to arbitration and then determine, after the arbitrator had rendered his award, whether it needed to assert jurisdiction to determine whether an improper practice had occurred." (Union's letter dated January 26, 2009, at 1). However, in our decision, we stated:

> [W]e defer to the arbitration process that part of the § 12-306(a)(1) and (a)(4) failure to bargain claim that relies on the interpretation of the Policy and the parties' agreements. 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 (internal quotations omitted). The Union misconstrues the clear language of our ruling.

In the initial pleadings in this matter, the Union alleged that DPR was not acting in accordance with its "long-standing procedure" regarding promotions, and thereby "altered the procedure and violated the NYCCBL." (Pet., ¶ 1). The Union now argues that the arbitrator did not address whether the Policy in place was negotiated, and therefore that the "critical issue [was] whether the policy was *mutually* agreed." (Union's Letter, dated January 26, 2009, at 2) (emphasis in original). However, we find that such issue is not within the scope of the grounds we articulated in our prior ruling as constituting the limited basis upon which we would reassert jurisdiction.

The issue in the improper practice claim, which alleged a unilateral change, was whether "DPR failed to implement policies granting preference to PS I employees seeking advancement to the PS II level" that arose from the parties collective bargaining agreement and their 1986 and 1993 negotiated policies; the issue decided by the arbitrator was whether DPR failed to follow the Policy. The two issues, although not identical, so substantially overlap that an affirmative answer to the question decided by the arbitrator disposes of the factual predicate of the improper practice claim. Accordingly, we find that the arbitrator's determination that DPR acted consistent with the Policy resolves the improper practice claim. We note that the arbitrator's finding that DPR did not violate the Policy necessarily impels the conclusion that DPR did not unilaterally change the Policy.

We find that the issues raised by the Union's improper practice petition were fully litigated during the arbitration. In his opinion and award, the arbitrator reached the merits of the case presented to him; therefore clearly the arbitration process was not foreclosed. As the first circumstance under which we might assert jurisdiction does not apply here, we would only reopen this matter upon a showing that the arbitration award was repugnant to the NYCCBL. However, the Union has failed to allege, and we find no basis upon which to conclude, that the arbitration award was "tainted by unfairness or serious procedural irregularities" or that the award was repugnant to protected rights. *New York City Transit Auth.,* 4 PERB ¶ 3031, at 3670. Accordingly, we deny the Union's request that we reassert jurisdiction in this matter. *See D'Onofrio,* 1 OCB2d 38 (BCB 2008).

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 Union's request that the Board reassert jurisdiction over this matter docketed as BCB-2489-05, be, and the same hereby is denied.

Dated: March 9, 2009
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER