L.1320, DC37 v. Office of Mun. Labor Relations, 29 OCB 16 (BCB 1982) [Decision No. B-16-82 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

LOCAL 1320, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Petitioner, Decision No. B- 16-82

-and-

Docket No. BCB-512-81

THE NEW YORK CITY OFFICE OF
MUNICIPAL LABOR RELATIONS.

Respondent
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DECISION AND ORDER

Local 1320, District Council 37, AFSCME, AFL-CIO (hereinafter "Local 1320") filed an improper practice petition on July 1, 1981 alleging that the City of New York, by its Office of Municipal Labor Relations (hereinafter "the or "OMLR") violated Sections 1173-4.1 and 2173-4.2(a)(1), (2) and (4) of the New York City Collective Bargaining Law (hereinafter "NYCCBL")[1] by terminating the full-time grievance representative status of

[1] These sections of the NYCCBL provide:

§1173-4.1 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. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit,

[continued]

Local 1320 President John Toto. The City filed its Answer on July 24, 1981 denying Local 1320's contentions. OMLR stated that, inter alia, it had discussed the matter with representatives from

District Council 37 the certified bargaining agent for Sewage Treatment Workers and Senior Sewage Treatment Workers, before taking any action. On

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Footnote 1/ continued...
nor shall they have the right to bargain collectively; provided, however, that nothing in this Chapter shall be construed to:(i)deny to any managerial or confidential employee his rights under section 15 of the New York Civil Rights Law or any other rights; or (ii) prohibit any appropriate official or officials of a public employer as defined in this Chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment, and to make recommendations thereon to the Chief Executive Officer of the public employer for such action as he shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

§1173-4.2 Improper practices; good faith bargaining.

a. Improper public employer practices. 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 1173-4.1 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.

July 29, 1981 Petitioner filed its Reply in which it claimed that it was the certified representative for the employees in the unit in question. A Notice of Hearing was issued 5, 1981.

Hearings were held on four days between August 31, 1981 and November 30, 1981. At the commencement of the hearing, the City amended its Answer to admit that Local 1320, while an affiliate of District Council 37, holds the bargaining certificate

for unit employees in its own right. Similarly, the Petition was amended to allege that the-City violated the Law by interfering with the internal election processes of District Council 37 and that the City gave preferential treatment.to certain employees on account of their political affiliations within the Council. Post-hearing briefs were filed by both Petitioner and Respondent on January 20, 1982.

BACKGROUND

John Toto entered City employment in 1959, as a Sewage Treatment Worker. By 1965 he had become President of Local 1320. which represents Sewage Treatment Workers, and in that year he assumed the first of several staff positions in District Council 37 and was on leave of absence from his job with the City. He served as both Director of District Council.-37's Blue Collar and White Collar divisions and serviced over sixty locals until November, 1979 at which time his employment,with District Council 37 was terminated and he returned to full-time work as a Sewage Treatment Worker. In the ensuing months, Toto acted as the Local's ad hoc grievance representative,on a regular basis.

In January, 1980, Toto was elected President of Local 1320 and began to seek authorization to serve as the paid, full-time grievance representative on behalf of the Lccal. Such application was made pursuant to Executive Order No. 75, which governs 11release time" arrangements. Prior to this time, Local 1320 never had a release time representative. Instead, the Local was

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serviced by Council representatives as the need arose.

On January 21, 1980 Toto wrote to OMLR Director Bruce McIver requesting a meeting to discuss his release time status. McIver responded in a letter dated January 23, 1980 stating that "OMLR grants release time to individuals only at the request of the head of the union, in this instance District Council 37...." Toto then sought District Council 37's assistance in procuring official release time authorization. He wrote to its Director of Research, Al Viani, on January 31, 1980 for aid. on Toto's request, Viani set up a meeting which took place on February 14, 1980 and was attended by Toto, Viani, McIver and various other officials from both District Council 37 and OMLR, including OMLR Deputy Director Harry Karetsky. At the meeting, McIver asked Viani to put the Council's support for Local 1320's request in writing, which Viani agreed to do. Toto wrote to Viani that same day, thanking him for the Council's support and assuring him that Viani had the Local's authority to act on its behalf in this matter.

On February 20, 1980 Viani submitted a formal written request to McIver for the full-time release of John Toto. A week later, Karetsky met with Toto and several District Council 37 officials. Karetsky expressed concern that Viani might have acted without authorization from the Council and Gotbaum. Toto told Karetzky that he would discuss the matter with Viani, which he did the next month.

Viani arranged for another meeting, one which took place on March 18, 1980. At this tinise-, Karetsky reiterated that the Council's request on Local 1320's behalf had to be "formalized" by Gotbaum. Karetsky offered Toto two days of paid release time per week, an offer which Toto flatly rejected.

On May 6, 1980 Toto wrote to OMLR Director McIver seeking reconsideration of Karetsky's two-day offer and threatening litigation if the matter was not resolved by May 21, 1980. Karetsky responded on O11LR1s behalf on May 13, 1980. In his letter, Karetsky restated his offer to Toto of two days' release time per week.

At the start of the AFSCME convention in California in June, 1980, Toto met with Gotbaum and discussed the release time situation. Gotbaum promised to support the--Local's request and said that he-would have Viani call McIver. A few days later, Gotbaum told Toto that McIver had approved his request for Toto's full-time release.

On July 1, 1980, Toto began serving as the Local's grievance representative. In the fall of that year, Toto ran for the.position of Treasurer of District Council 37. His opponent was the.incumbent ca.ndidate, Arthur Tibaldi. Toto subsequently lost the election, which was held in January, 1981.

On December 18, 1980 Karetsky wrote to Gotbaum and stated that "John Toto will be returned to his former two (2) days of release time per week effective January 1, 1981." Gotbaum replied

to McIver on December 23, 1980 and wrote: "You gave Mr. Toto a

year's full time released status. I e~pect you to adhere to this." Shortly thereafter, Gotbaum and Viani notified Toto that Karetsky had erred and that the matter had been resolved.

Internal District Council 37 memoranda indicate that between February and April, 1981, the Council addressed itself to various release time problems. District Council 37 was beyond the allowable maximum number of people on release time and the City was insisting that this circumstance be corrected. Minutes from Council meetings state that in order to comply with the union-management agreement of one release time person for every

2,000 employees, a number of griavance representatives would have to be returned to service.

On March 16, 1981 Gothaum wrote to McIver regarding modifications in :the release time status of nine'-people, one of whom

was Toto. Effective July 1, 1981, Toto was to.have his release time changed from five days per week to two days per week. In a letter dated April 2, 1981 McIver made adjustments in the release time status of sixteen individuals. Included was Toto, who was to be "reduced to a release with pay for two (2) days per week effective July 1, 1981.11

On June 17, 1981 Gotbaum wrote to McIver requesting renewal certificates for fifty-nine people who were on either full-time or part-time release status. According to this letter, Toto was to have his full-time release renewed. However, subsequent to writing this letter, Gotbaum telephoned Karetsky and informed him that the inclusion of Toto's name was an error.

On June,18, 1981 McIver wrote to Toto advising him that his release time assignment with pay would terminate on June 30, 1981. Toto wrote to McIver on June 22, 1981 requesting a oneyear renewal of his full-time release. Toto stated that Local 1320 was the certified representative of the employees in the unit and had not requested the termination of its grievance representative's services.

on June 29, 1981 Eugene Egan, Director of Labor Relations for the Department of Environmental Protection, wrote to Toto and stated that he had been informed by OMLR that Toto's release time status would be terminated on June 30, 1981. Therefore, Toto was to report back to work on July 1, 1981.

' Since' July 1, 1981 Toto has reported to his work location on a daily basis. However, he has not been regularly performing sewage treatment work. Toto has instead again been serving as the Local's ad hoc grievance representaive, on an almost daily basis.

POSITIONS OF THE PARTIES

Local 1320's Position

Petitioner claims that OMLR violated the NYCCBL in a number of ways. According to Petitioner, the City violated Section 1173-4.1 because it "had no right to strike a bargain with Gotbaum or D.C. 37 in June of 1980, or in June of 1981" concerning release time for Local 1320, the certified bargaining agent for unit employees. The termination of Toto's full-time release status amounts to an improper practice since the action

was taken absent a request from the certified representative. Nor can Resoondent claim ignorance of the proper identity of the certificate holder, since Toto underscored Local 1320's status with OMLR in the beginning half of 1980. Petitioner argues that Respondent's motion to amend its Answer should not have been granted and moves for summary judgment, contending that OMLR failed to raise any question of Local 1320's entitlement to release time.

Petitioner, with a membership of approximately 600 employees, maintains that Executive Order No. 75 gives no single standard for

determining a ratio for the release of grievance representatives. It claims that Respondent failed to meet its burden of proof of establishing that the the City grants one release time person for every 2,000 e4nployees in a unit. No written--policies were submitted into evidence to support this ratio, which Toto characterizes as, inter alia, "a myth".

Petitioner challenges the entire release time relationship between the City and District Council.37. It argues that Respondent's treatment of District Council 37 as a single bargaining unit

> is not within the spirit or intent of Executive order #75 as it infringes on the autonomy and integrity of the bargaining unit determined pursuant to the NYCCBL (Sect. 1173-3.0 "ll') and usurps the authority of the Board of Certification of OCB.

Petitioner contends that District Council 37 had no standing to act on behalf of Local 1320 and other unit represen

tatives and that Respondent had no basis or qualification for dealing with District Council 37 in matters of release time for representatives of such autonomous bargaining units. In this connection, it is argued that Executive order No. 75 allows for the release of representatives to service only employees in their own certified bargaining units. Furthermore, allowing grievance representatives released to District Council 37 to be used "interchangeably" to service units other than their own, violates

both Executive Order No. 75 and the court order in Butler v. City 2/ of New York.

Petitioner claims that allocations of release time were utilized, in internal political conflicts in District Council 37, to reward those in favor with the leadership and to punish those who were not; and that by allegedly cooperating with District Council 37 in this practice, Respondent interfered in the administration of Local 1320 in violation of §1173-4.2(a)(2) of the Law. In thus dealing with District Council 37 instead of Local 1320, Respondent is said to have been guilty of a refusal to bargain in violation of S1173-4.2(a)(4). City's Position

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0MLR argues that the NYCCBL does not provide for or govern release time relationships between the City and employee organizations. Hence, this Board has no jurisdiction to review the City's judgment under Executive Order No. 75.

2/ Index No. 14410/79, November 14, 1979.

The City maintains that Petitioner failed to prove that the City: (a) refused to negotiate with Petitioner over a mandatory subject of bargaining; or (b) discriminated against Local 1320 for engaging in protected activities; or (c) interfered with internal. union election processes. Respondent also argues that Petitioner's allegations of collusion between OMLR and District Council 37 are unsupported by any factual evidence. Rather, Petitioner has relied entirely upon uncorroborated, hearsay statements to support his contention.

The City states that it grants release time authorization to the organization that holds the bargaining certificates irrespective of which locals comprise the bargaining unit.' District'C6uhcil 37 holds the bargaining certificates for approximatel~*60 constituent locals, excluding Petitioner.and one other local (Local 375, Civil Service Technical Guild). Applying the 1:2000 ratio, the Council is entitled to approximately 52 full-time release persons.

District Council 37 routinely submits lists of names to OMLR to fill its release time quota; it also routinely seeks the termination of the release of others. OMLR argues that it does not concern itself with a union's internal allocation of released personnel. it seeks only to insure that the activities conform to the terms of Executive Order No. 75.

The City states that it was unaware in January, 1980 that Local 1320 held its own certificate. It therefore advised Toto to seek authorization from District Council 37. By May, 1980,

Karetsky realized that Local 1320 was indeed the certified bargaining agent for unit employees. It then offered Petitioner a paid release of two days per week, based on the application of the 1:2000 ratio to the 600 employees in the unit. After Toto refused this offer, District Council 37 interceded, sought and obtained a one-year full-time releasefor Toto to be credited against the Council's quota of authorizations.

When Gotbaum rescinded his support for Toto's full-time release,a year later, and asked that it be terminated, OMLR did so. The City maintains that it could not require District Council 37 to continue Toto as an authorized representative nor was it under any obligation to grant Toto more than his union was entitled to.

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The City argues that Petitioner's reliance on the fact that Karetsky was'-unaware from January to May, 1080 that Local 1320 was the certified employee representative is an invalid basis for an improper practice finding. OMLR urges that this misconception was understandable in light of the facts that: (a) Local 1320 never requested release time before; (b) the Council holds nearly all of the certificates for its locals; (c) District Council 37 had always serviced Local 1320 in the past; and (d) Toto constantly appeared with Council representatives. Moreover, the City claims that events which took place in early 1980 are time-barred by the Law's four-month statute of limitations.

DISCUSSION

It is well established that a demand for paid release t to conduct union activities that significantly and materially

affects a bargaining relationship and furthers the policy favoring
3/ sound labor relations is a mandatory subject of bargaining. Furthermore, a demand for release time is negotiable at the unit

level with the certified collective bargaining representative 4/ for the employees in that unit.-

The record shows that before the City grants release time authorization, certain criteria must first be met by the bargaining agent. Among the factors that Executive Order No. 75 mandates the Director of Labor Relations to take into account are: the number of employees in the unit, the number of titles in the unit, the grievance activity in the unit and the dispersion of the unit in affected work areas. Contrary to the contentions of the Petitioner, we find 1--hat the City does gpnerally apply a formula of granting one paid, full-time release person for every two thousand employees in a-,civilian unit. We take administrative notice of the testimony of former OMLR Director Herbert.Haber quoted in Decision No. B-1-68 in which he describes the release time program the City was about to implement. Ile states that the formula would be flone person released for every 2,000 of membership." Additionally, we look to the letter of another former 014LR Director, John Burnell, written to Victor Gotbaum on July 22, 1974, in which Burriell states:

> As you know, full-time assignments were granted on the basis of one person for labor-management activities per 2,000 covered employees and one leave without

3/ Decision No. B-22-75.
4/ However, see Discussion, pp 13-15, infra.

> pay per 1,000 employees. Part-time assignments are given where the number of covered employees exceeds 2,000 but is less than the number required for an additional full-time assignee. Those who do not fall into any of the above categories have been granted administrative leaves without pay.

Some minor variations in the application of the ratio have been achieved through collective bargaining and are acknowledged by the City. For example, Local 1320, with a membership of approximately 600, would be entitled to release time of only one and a half days per week rather than the two days per week offered by Karetsky to Toto.

The 1:2000 ratio does not apply to the uniformed units, even though Executive Order 75 does not make a distinction between non-uniformed an d uniformed forces. This is explained in part by historical reasons and long-established practices as well as the vast spread of the uniformed forces throughout New York City. It should be observed,..moreover, that the matter is subject to negotiation, which, itself, provides a certain degree of diversity. It has been pointed out that this has been true in the case of Local 1320.

District Council 37 is the holder of the certifications of all but a few of its constituent locals; Local 1320 is one of the exceptions. It is clear from the record that it has been the long-, standing practice of District Council 37 and its locals, including Local 1320, since the inception of the release time practice, for District Council 37 to obtain a single group of 52 full-time releases That number covers all releases to which the group as a whole is entitled. Those releases are apportioned by District Council 1-7 amongst representatives of the various locals according to criteria which are of no relevance to the issues before us. The significant

fact is that, whatever the respective release time entitlements of the various locals might have been and regardless of the differing rights to bargain independently-enjoyed by some of the locals, including Local 1320, they accepted, approved and actively participated in the system described above. That this was a purely voluntary arrangement, at least as to locals such as Local 1320, which held their own certification, is shown by the fact that there were exceptions. Thus, for example, Local 375 did not participate in the system-but bargained independently for released time and had its own designees released in accordance with the 1:2000 formula. As for Local 1320, it never had, nor bargained for,nor sought to bargain for,a representative on release time until 1980. During the preceding 14 years, Toto was an executive staff member of District Council 37 and a member of its Executive Board. At no time during those 14 years did Toto or any other representative of Local 1320 protest the practice regarding release time or seek to bargain independently for release time allowances for Local 1320. In fact, even after Toto returned to his work as a Sewage Treatment Worker and to the office of the President of Local 1320 and sought to bargain independently with the City for Local 1320 release time, he sought and received the aid and intervention of District Council 37 in obtaining a full-time release instead of the 1 1/2 days to which the Local's membership of 600 would have entitled it. It was clearly understood that this concession which District Council 37 obtained on behalf of Local 1320 was for a one-year period. Toto thus is clearly in no position to argue that OMLR had "no right to strike a bargain with Gotbaum or District Council 37" concerning his release time. Even as late

as 1980, Toto aggressively sought, ur~ed and authorized the Council's efforts on his behalf--. He did not complain about the conduct of either District Council 37 or OMLR officials when he was given an additional three days release time and cannot do so now. For fourteen years he had participated in and supported the system whereby District Council 37 bargained for all release time available to the constituent locals. Having thus clothed District Council 37 with authority and having given OMLR every indication that District Council 37 was its authorized agent in the matter over such an extended period of time, neither Local 1320 nor Toto may now complain that OMLR acted in accordance with the circumstances thus established, nor claim persuasively that there was sinister significance to the confusion as to who had authority to bargain on the matter when-- in 1980, and as the result of internal developments in District Council 37, Local 1320 decided to assert its right to bargain'independently on release time.

The special arrangement for Toto to have one year of fulltime release instead of the 1 1/2 days to which Local 1320 was entitled or the two days OMLR had offered was granted by the City on the basis of District Council 37 agreeing to allow 3 days per week to be charged against its pool of release time. In June, 1981, District Council 37 reclaimed their release time line that had been used for one year by Toto pursuant to that special arrangement. The City thus had no choice but to acquiesce in

the Council's demand to terminate Toto's full-time release.

Petitioner argues that his case is the only one in which OMLR "abandoned" its practice of changing a grievance representative's release time allotment (in the absence of unlawful activity) only upon the request of the certified bargaining agent. However, we find that in granting terminating or. modifying release time, the City routinely dealt with the union that originally sought the release. Since it was District Council 37's allotment (rather than Local 1320's) that was being changed, OMLR had the duty to deal only with the Council concerning this matter. At Toto's urgent request, District Council 37 had given up 3 days of its entitlement to be added to the 2 days 014LR was willing to grant Local 1320. This arrangement was made on a one-year basis and at the end of the year District Council 37 had the right to take back its 3 days and OMLR bad a duty to accede to that change.

Petitioner challenges the entire releiase time arrangement engaged in between the City and District Council 37, especially those aspects of it that permit the interchange of grievance representatives. Petitioner's challenge is beyond the scope of the present proceeding. The issues herein relate to whether OMLR committed improper practices in its handling of release time as it pertains to and affected John Toto in his capacity as President of Local 1320. Petitioner's attempts to broaden the scope of this inquiry were inappropriate. The system employed within District Council 37 with regard to release time is of legitimate concern to Petitioner and to this inquiry only insofar as it can be shown to have affected the interests of Local 1320 and/or John Toto adversely and improperly.

Petitioner's objections on the record and in its brief

that certain documents were not received in evidence are totally without merit. Much of the rejected material pertains to the rights that flow from a labor organization's "certified" status, an issue not before us in the present proceeding. With regard to Petitioner's own status, OMLR amended its position at the commencement of the hearing to acknowledge that Local 1320 was the certificate holder for the unit in question. There was thus no need to burden the record with unnecessary documentation to prove a point no longer in contention.

Petitioner claims that the City violated the Law by acting as "agent" for the District Council 37 leadership. As evidehce, Local 1320 shows that persons in good standing with the leadership became release time representatives while Toto, having fallen into disfavor, had his allotment cut. Upon this basis, Petitioner speculates further that OMLR had knowledge of all of these6ircumstances and contends thatl:ithis web of fact, conjecture, speculation and suspicion

> ..confirm the obvious conspiratory
> ;ole Respondent OMLR played in the
> ,political manipulations utilized by Gotbaum in "punishing" those who hold a different philosophy or who are political opponents of Gotbaum.

Petitioner's conclusory allegations of 014LR's "political chicanery" do not support a finding of improper practice. Assuming arguendo, that release time grants are apportioned within District Council 37 on an other than per capita basis, it is not OMLR's concern so long as the Council stays within its release time allotment quota. Once the release time allocation has been determined, OMLRIs role in channeling release time is basically a ministerial one. After the bargaining agent has designated a representative, the City's

primary concern is to monitor the release time activities of that individual to see to it that labor relations activities are actually being performed during the time alloted.

Petitioner has failed to prove that the City interfered with internal union election processes or that the City showed improper preferential treatment: to certain of its enployees on account of their political affiliations. The record established herein is devoid of any objective evidence to support these allegations or-to show that the actions of OMLR officials were intended to or did, in fact, interfere with or diminish Petitioner's rights under 'Section 1173-4.1. Allegations of such improper motivation must

be based upon statements of probative facts rather than recitals 5/ of conjecture, speculation and surmise.

For the reasons set forth above, we will grant the City's Motion to Dismiss.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

5/ Decision Nos. B-30-81; B-2-82.

ORDERED, that the improper practice petition, as amended,

filed in this instant case be, and the same hereby is, dismissed.

DATED:

New York, New York May 20, 1982.

ARVID ANDErSON
CHAIRMAN

MILTON FRIEDPLA-1-4
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVEP
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
~_' N -',MEMBER