L.1549, DC37 v. NYPD, 29 OCB 30 (BCB 1982) [Decision No. B-30-82 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO and LOCAL 1549,

DECISION NO. B-30-82
DOCKET NO. BCB-554-81

Petitioners

-and-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.
----------X

DECISION AND ORDER

On December 24, 1981, District Council AFSCME and its affiliated Local 1549 (hereinafter jointly referred to as "D.C. 37" or "the Union") filed an improper practice petition based on an alleged and continuing refusal of the Police Department to permit Local 1549 Chapter Chairperson Frank Burns to communicate with and represent members of the local. D.C. 37 further alleges that the Police Department is "encouraging a membership drive by a union seeking to displace petitioner" and is "inhibiting petitioner's ability to respond to the said drive." The Union contends that these actions by the Police Department are violative of subdivisions (a) (1), (a)(2) and (a)(3) of Section 1173-4.2 of the New York City Collective Bargaining Law ("NYCCBL")

After receiving an extension of time, the City of New York

("the City") filed, on January 14, 1082, a motion to dismiss D.C. 37's petition. Counsel for D.C. 37 filed a letter in response to the City's motion on January 19, 1982. Additional letters were submitted by the City and the Union on February 2nd and February 10th, respectively. On February 22, 1982, the City withdrew its motion to dismiss. We granted the City's request for an additional ten days in which to file an answer to the petition and, on March 4, 1982, the City filed its answer. The Union did not file a reply.

BACKGROUND

The eighth floor of the Police Department building at One Police Plaza is the location of the "911" emergency telephone response operation. The eighth floor work area is secured and admittance by the public is prohibited, as the operation entails the immediate delivery of police services on an emergency basis. No non-emergency work is conducted at this site.

D.C. 37 is the certified bargaining representative for the titles Police Communications Technician and Supervising Police Communications Technician[1] which are utilized in the "911" operation. Frank Burns is a representative of D.C. 37 assigned to service the "911" employees in D.C. 37's bargaining unit. The Department grants access to Mr. Burns for the purpose of contract administration in accordance with a procedure which, however, prohibits his communicating with unit employees in the immediate

[1] Certification No. 46C-75 (as amended by Decision No. 36-80)

area of the "911" operations. The ninth floor of one Police Plaza contains a Quiet Room and a cafeteria. There are no restrictions on contacts with union members when they are on the ninth floor.

It is alleged that, on at least two occasions in December of 1981, two employees in D.C. 37's bargaining unit distributed leaflets for the Fire Alarm Dispatchers Benevolent Association, a rival union. The filing of the instant improper practice petition arises out of these events and the alleged continuing refusal of the Police Department to grant Mr. Burns unlimited access to members of the unit working on the eighth floor.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the Police Department has violated subdivisions (a)(1), (a)(2), and (a)(3) of Section 1173-4.2 of the NYCCBL, which provide that:

> a. 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.

D.C. 37's claims are twofold. First, it asserts that the Police Department has refused to grant Frank Burns access to employees of the "911" telephone operation, thereby interfering with his ability to represent bargaining unit members. This Police Department action, the Union alleges, also coerces public employees in the exercise of their rights, because Burns is prevented from communicating with them.

Secondly, the Union states that leaflets of the Fire Alarm Dispatchers Benevolent Association, a rival union, were distributed to members of the unit to which Mr. Burns allegedly has been denied access. D.C. 37 asserts that, by permitting such distribution, the City is "encouraging a membership drive by a union seeking to displace petitioner while inhibiting petitioner's ability to respond the said drive."

The Union seeks the following relief:

1) that Mr. Burns be given access to all floors and locations where his chapter members work;

2) that the City cease its harassment of Mr. Burns or other union officials in the performance of their duties; and

3) that the City cease and desist from all activities which assist the challenge of the Fire Alarm Dispatchers Benevolent Association.

City's Position

In its answer to the improper practice petition, the City asserts that Frank Burns has not been denied access to members of his unit. Rather, the City explains, in order to maintain the

efficiency of its "911" operation, Mr. Burns must follow certain procedures before he may meet with individuals who work on the eighth floor. He must request such a meeting, which the floor supervisor will grant if it is operationally feasible, in accordance with release time procedures. The . meeting will take place in a secluded room on the eighth floor or in the Quiet Room on the ninth floor, i.e., in an area removed from the activity of the 911 operators.[2]

The City claims that it has "an unfettered right" to institute these procedures pursuant to Section 1173-4.3b of the NYCCBL, which provides in pertinent part as follows:

> It is the right of the City ... 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; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

The City contends that Police Department procedures restricting access on the eighth floor are essential given the potential for a life or death emergency call, and are well within its managerial prerogative. The City states that Mr. Burns

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[2] Affidavit of Lieutenant Peter Pomposello, appended to the City's answer to the improper practice petition, at ¶6.

is cognizant of these procedures, and that lie is also aware that the ninth floor is open to all organizations in the building at all times. The City asserts that it was at this location, rather than in the restricted eighth floor work area, that material of the Fire Alarm Dispatchers union was distributed and the employees who distributed such material were aware of and subject to the policies outlined above. The City notes that petitioner has not alleged otherwise.

At all times, the City claims, the Police Department has maintained its duty of neutrality toward competing unions, in accordance with a City-wide policy promulgated as of October 25, 1979.[3]

The respondent asks that the petition be dismissed entirety.

DISCUSSION

Rule 7.9 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") provides that, in proceedings before the Board of Collective Bargaining ("Board"), the petitioner may serve and file a reply to the respondent's answer

[3] This policy, entitled "Employer Response to Organizational Activity," states in pertinent part that solicitation of union membership by agency employees can be prohibited during working time to the same extent that all solicitations can be barred, but cannot be prohibited during an employee's free time in non-working area (e.g., lunch area) or during free time in working areas to the extent that such solicitation does not interfere with the rendering of services or production. Further, materials may be distributed by Agency employees if these guidelines are followed, but may be barred in areas when littering is a problem (e.g., where cleanliness is required for safety reasons). On May 5, 1980, Bruce McIver, Director of the Office of municipal Labor Relations, issued a memorandum to all Agency leads in which lie directed that this rule should "continue to be followed by your agency."

which

> "shall contain admissions and denials of any additional facts or new matter alleged in the answer."

Rule 7.9 also provides that:

> "Additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply."

Since D.C. 37 did not file a reply, the application of Rule 7.9 will result in our accepting as true the City's uncontested assertions that:

1) Frank Burns has not been denied access to the employees in the bargaining unit certified to D.C. 37. However, Mr. Burns is required to adhere to prescribed Department procedure before meeting with unit employees and such meetings must take place in an area removed from the activity of the "911" operation, either in a secluded room on the eighth floor or on the ninth floor of One Police Plaza;

2) Access to the eighth floor working area is denied equally to D.C. 37 and to any other union. On the two occasions in 1981 when organizational materials were distributed by two unit employees on behalf of a rival union, such distribution took place only in the ninth floor Quiet Room and cafeteria, an area to which all organizations in the building have equal access.

3. The Police Department has applied its access policy (see note 3 supra) in a non-discriminatory fashion, maintaining complete neutrality toward competing unions,

We must conclude that, contrary to the allegations set forth in D.C. 37's improper practice petition and explanatory letter of February 10, 1982, the Police Department has not denied access by Frank Burns to employees in the unit, but has limited such access as to time and place "so as to ensure continuity of service without distraction" in the work area of the "911" emergency telephone response operation. It appears that such limitation on access to employees in the immediate area of the "911" operation is accomplished by means of a procedure which has been devised for the specific purpose of permitting meetings between a union representative and the unit employees for contract administration and grievance handling and not to interfere with or to prevent such meetings. The need for such a procedure has been convincingly explained by the City. Moreover, we agree with the City that the establishment of such a procedure is within its management prerogative under NYCCBL section 1173-4.3b, inter alia, to "maintain 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 and the technology of performing its work."

In NLRB v. Babcock and Wilcox Co.,[4] which is cited by the City in its answer, the United States Supreme Court upheld the employer's private property rights in the face of a demand by non-employee union representatives for access, to engage in organizational activity, to the employer's parking lot. The Court held that the employer's conduct did not violate the National Labor Relations Act's prohibition of employer interference, restraint or coercion of employees in the exercise of rights guaranteed by the Act, in view of the avail ability of reasonable alternatives by which the union could communicate with its intended audience. While the petitioner in the matter before us is an incumbent union seeking access for contract administration purposes rather than for purposes of organizational activity, the principle enunciated in Babcock is not without relevance. It is clear that the availability to D.C. 37, as well as to any other organization, of the ninth floor Quiet Room and cafeteria constitutes a "reasonable alternative" to access to the eighth floor work area.

More closely analogous to the instant matter, are several decisions of the New York State Public Employment Relations Board ("PERB"). In Addison Central School District, for example, a PERB Hearing officer found that, "although an [incumbent]

[4] 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956).

organization's need for a meeting place on employer premises ... is self-evident, the need for a particular room for the meeting is not."[5] In that case, as in the matter before us, the employer had a good faith reason for denying access to the union to a particular location on its premises. In fact, in the case before us, the employer's need to secure an area in which emergency work is performed is arguably even more compelling than the school principal's reasoning in Addison that union activity in the faculty room would disturb teachers who were working there. Further, in the instant case, as in Addison, we find no evidence of improper motivation for the challenged actions of the employer.

In Board of Education, City School District of Albany, a PERB Hearing Officer found that the school district did not violate Taylor Law Section 209-a.1 by refusing access to non-employee union representatives to inspect employer facilities in the investigation of a grievance. The Hearing officer ruled that "an employer may restrict access to its premises...when such restriction will not prevent a certified employee organization from reasonably representing its constituents...."[6] The full Board upheld the Hearing Officer's decision, noting that an employer's refusal of access is not improper if the necessity for such access is not established.[7]

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[5] 13 PERB ¶4602 (H.O. 1980) at 4683.

[6] PERB ¶4521 (1972) at 4589.

[7] 6 PERB ¶3012(1973).

The second aspect of D.C. 37's claim concerns allegations that the City discriminated against the incumbent union by permitting the distribution of leaflets on behalf of the Fire Alarm Dispatchers Benevolent Association, thereby facilitating its membership drive, while inhibiting D.C. 37's ability to respond to that drive.

Again, the application of OCB Rule 7.9 leads us to conclude that the City's limited access policy is enforced evenhandedly with respect to the petitioner and the rival union. Therefore, we cannot agree that by granting access to the Fire Alarm Dispatchers union, the City has aided a challenge to the incumbent in violation of NYCCBL Section 1173-4.2a (2) and (3).[8] Our ruling in this regard is also consistent with decisions of PERB.

In Gates-Chili Central School District, PERB affirmed a Hearing Officer's finding that Civil Service Law Section 208.2, which guarantees to a recognized or certified employee organization unchallenged representation status until seven months prior to the expiration of a collective bargaining agreement between the union and the public employer, does not prohibit the employer's permitting an outside employee organization to distribute information to public employees, unless such permission is improperly motivated by the employer's

[8] It is noteworthy that nowhere in its submissions did. D.C. 37 challenge the access granted to the Fire Alarm Dispatchers Benevolent Association per se. Petitioner challenges only the extent of access granted to the rival union and the City's alleged encouragement of that union's activities.

desire to circumvent its obligations to the incumbent union.[9]

The generally well-established policy of PERB, in cases involving a challenge to an incumbent union's representative status, is to grant "reasonable access" to the challenging organization.[10] Reasonableness has been defined, at a minimum, as access no less than that provided to the incumbent organization.[11] To the extent that this Board has dealt with questions of access for organizational activity by a rival employee organization, we have also adhered to a policy of equal access.[12] It appears that the Fire Alarm Dispatchers Benevolent Association has been afforded access equal to and no greater than that afforded to the petitioner, consistent with the minimum standard delineated by PERB and consistent with this Board's policy.

Since petitioner has failed to demonstrate that the City interfered with, restrained or coerced either Frank Burns or

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[9] 13 PERB ¶3028 (1980). The "information" distributed by the rival union in that case consisted of notice of an income tax seminar to be given by one other than a member of the union, the tax seminar itself, and the rival union's newsletter.

[10] See, e.g., Great Neck UFSD, 11 PERB ¶3079 (1978); Town of Tonawanda UFSD, 12 PERB ¶3055 (1979); County of Erie, 13 PERB ¶3105 (1980).

[11] County of Erie, 13 PERB at 3170.

[12] See New York State Nurses Ass'n V. New York City Health and Hospitals Corp., Decision No. B-12-80 (additional and equal opportunity provided to each of three competing unions to meet with unit employees prior to a union election).

the employees in the D.C. 37 bargaining unit in the exercise of their rights granted in NYCCBL Section 1173-4.1 by enforcing a limited union access policy in the "911" emergency telephone failed to demonstrate any way with the it has f ailed to Burns or against unit employees for participating in the activities of a union, we determine that no basis for a finding of improper practice has been stated. response operation, since petitioner has that the City dominated or interfered in administration of the Union, and since demonstrate any discrimination against

O R D E R

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 herein by District Council 37 and its affiliated Local 1549 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
August 24 1982

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD F. GRAY
MEMBER

MARK J. CHERNOFF
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD SILVER
MEMBER