USA, Local 831, 3 OCB 2d 27 (BCB 2010)

(IP) (Docket No. BCB-2788-09).

Summary of Decision: The Union filed a petition alleging that the City violated NYCCBL § 12-306(a)(1) and (4) when it implemented a new policy of charging employees various payroll-related fees. The City claimed that the petition was not timely filed as the Union had notice of the fees because its members were subject to these fees for years. After an evidentiary hearing, the Board found that the Union did not have notice of the fees until July 2009. Accordingly, the Board found the Union's petition was timely filed and found that the City violated NYCCBL § 12-306(a)(1) and (4). ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

THE UNIFORMED SANITATIONMEN'S ASSOCIATION,

Petitioner,

-and-

THE CITY OF NEW YORK, *et al.*

Respondent.

DECISION AND ORDER

On July 31, 2009, the Uniformed Sanitationmen's Association, Local 831, I.B.T. ("Union") filed an improper practice petition, amended on August 27, 2009, against the City of New York ("City"), the Department of Sanitation of the City of New York ("DSNY"), the Office of Labor Relations, and the Office of Payroll Administration ("OPA"), claiming that the City violated New York City Collective Bargaining Law ("NYCCBL") § 12-306(a)(1) and (4), and § 12-307(a), when the City unilaterally instituted new payroll-related fees for employees. These fees included charges to obtain a replacement paycheck, copies of a payroll statement, an earnings report, a paid check, or

a W-2 or 1127 tax form for any tax year prior to the past three years. The City argued that the imposition of the payroll fees did not constitute a unilateral change in a term or condition of employment, was not a mandatory subject of bargaining, and that the City had a managerial right to create and implement the new policy. As to the fee to replace a paycheck, the City argued that the petition should be dismissed as untimely.

On January 25, 2010, the Board issued an interim decision, *USA, Local 831*, 3 OCB2d 6 (BCB 2010), finding that the City violated NYCCBL § 12-306(a)(1) and (4) when it implemented the fee to obtain a replacement paycheck. The Board found that the record did not contain sufficient evidence to determine whether the balance of the petition was timely and ordered a hearing.

Based on the evidence introduced at the hearing, the Board finds that the Union did not have notice of the fees until July 2009. Accordingly, the Board finds that the Union's petition was timely filed and, in accordance with its earlier decision in this matter, finds that the City violated NYCCBL § 12-306(a)(1) and (4).

BACKGROUND

After one day of hearing, the Trial Examiner found that the totality of the record established the relevant background facts to be as follows:

The Union represents Sanitation Workers employed by the City. The City's payroll for employees serving in all City agencies, including DSNY, is disbursed by OPA. Prior to July 2003, OPA did not charge employees to receive the services at issue here.

On July 10, 2003, OPA issued a memo to "All Concerned Agencies," concerning "Fees for Services," which states in pertinent part:

> Effective July 7, 2003, the Office of Payroll Administration will charge the following fees for certain services as follow[s]:
>
> | Service | Fee |
> | --- | --- |
> | Request for a Copy of a Payroll Register | $22.00 |
> | Request for a Copy of an Earnings Report | $22.00 |
> | Request for a Copy of a Paid Pay Check | $22.00 |
> | Request for a Copy of a W-2 or 1127 Statement | $5.00 |

(Ans., Ex. 1). The record contains no evidence that the City sent a copy of this memorandum to the Union. The City's policy of charging fees for these services has not changed since the issuance of this memorandum.

Harry Nespoli, the Union President, testified that he did not have knowledge of the payroll fees until July 2009, when he learned of the check replacement fee. He testified that the Union's Executive Committee did not know about the July 2003 memorandum until this proceeding began. Further, Nespoli testified that Union staff members who handle inquiries from retiring members were not aware of the payroll fees until he brought the fees to their attention. He also stated that his members would have complained to their shop steward or other business agents if and when they were charged such a fee.

The City introduced into evidence several OPA document request forms, which established that, in 2007 and 2008, OPA charged fees to at least eight current or former Sanitation Workers pursuant to the fee schedule. Neil Matthew, OPA's Deputy Director of Payroll Operations, testified that the documents introduced reflect only a sample, not the total set, of the employees that paid such fees. He also testified that DSNY employees paid these fees earlier than 2007 but that records of such were archived and therefore difficult to access. The Union asserts that two of the eight employees cited by the City were no longer employed by DSNY at the time their document requests were made and, therefore, they were not bargaining unit members. The Union asserts, and the City

does not deny, that all of the employees about which the City presented evidence were rank and file members; none were Union officials or agents.

POSITIONS OF THE PARTIES

Union's Position

The Union submits that its claims regarding these fees are timely. Although the City raised timeliness as a defense to the Union's claim, it failed to meet its burden of proof. The City presented no direct evidence that the Union had actual or constructive knowledge of the new payroll fees. Merely presenting speculation and unsupported assertions that someone at the Union should have been aware of the payroll fees is not sufficient to carry the City's burden. Therefore, the City's defense must fail.

A claim does not accrue until a union has been informed of a new policy, and an employer must act to ensure that an agent of a union has actual or constructive knowledge of the action. None of the Union's officers or agents had actual knowledge of the fees prior to July 2009. The City never notified the Union of these new payroll fees. The Union did not have constructive knowledge of the payroll fees before July 2009. The City cited a 2003 internal memorandum that discusses adopting such fees to support its argument that the Union had notice of the payroll fees. However, this document, which was sent by OPA to management of City agencies, does not prove or even suggest that the Union was given notice of the new fees. Circulating a memorandum to supervisors does not constitute constructive notice to the Union.

The Union refutes the City's claim that the Board should find notice to the Union because some Union members paid them. Notice to a small fraction of the Union's membership, standing alone, does not constitute notice to the Union. The City presented documents to show that eight

employees it contends were Sanitation Workers were charged the relevant payroll fees. The Union asserts that two of the eight employees about which the City presented evidence were not active Union members. Assuming the City's information is correct, giving notice to eight individual Sanitation Workers out of a workforce of 6,500 is not sufficient to impute knowledge to the Union. None of these employees were Union officials or agents; they were rank and file members who had no obligation to report policy changes to the Union.

As relief, the Union requested that the Board issue an order declaring that the City violated the NYCCBL, require that the City cease and desist from charging the fees and reimburse bargaining unit members that were charged the fees, and require the City to bargain in good faith before imposing such fees.

City's Position

The City argues that the Union's petition, filed in 2009, should be dismissed as it concerns fees instituted in 2003, of which the Union should have been aware. A petition must be filed within four months from the time that a Petitioner knew or should have known of the alleged improper practice; the Union's claims must be dismissed as they fall outside of the four-month statute of limitations.

While the City admits that the record is unclear about whether Union officials were formally notified of the change, the Union cannot reasonably argue that it did not have notice of OPA's fee schedule. The record clearly indicates that Union members had paid the fees years before the Union filed its petition. The Union President testified that he did not know about the new fees until 2009; however, his lack of knowledge is not dispositive. Union members may have complained to Union representatives with the information never reaching the Union President. The Union President also

testified that Union members certainly would have complained to their Union if and when they were charged such a fee. As the City has shown that members were indeed charged such fees, based on the Union President's testimony, Union members must have provided the Union actual notice. Union members often request W-2 statements when they prepare to retire. The Union itself refers its members to the City in order to procure such documents. It follows that Union members would have then notified the Union that they were charged the fees.

In addition, the City argues it has been prejudiced by the Union's failure to bring its claim in a timely manner. Due to the Union's delayed challenge to a decision the City made in 2003, the City is unable to present a full defense on the merits. The City's documents related to this claim from those years prior to 2006 are currently archived and attempting to access them would be burdensome. Had the Union filed in a timely manner, the City would have had the opportunity to thoroughly defend against the Union's claims on the merits. Thus, the Union's claims must be dismissed; to allow otherwise would defeat the purpose of a statute of limitations, which is to provide finality and resolve claims when evidence is most available.

DISCUSSION

Under NYCCBL § 12-306(e), claims of violations of the NYCCBL must be made within four months of the accrual of the claim, when a petitioner knew or should have known that the action in question occurred.[1] *Nardiello,* 2 OCB2d 5, at 28 (BCB 2009), *see also* § 1-07(b)(4) of the Rules of

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[1] NYCCBL § 12-306(e) provides in relevant part:

> A petition alleging that a public employer . . . has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the

the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). OCB Rule § 1-07(b)(4) provides that an improper practice "petition must be filed within four months of the alleged violation."

As we have long held, "[t]he statute of limitations begins to run upon the party having actual or constructive knowledge of definitive acts which put it on notice of the need to complain." *DC 37,* 1 OCB2d 21, at 12 (BCB 2008); *see UPOA,* 43 OCB 38, at 24-25 (BCB 1989). As the statute of limitations is an affirmative defense, the burden of proving notice where such is subject to dispute lies upon the party raising the defense. *Shelley v. Mintz, et al.,* 899 N.Y.S.2d 63 (N.Y. Co. Sup. Jul. 10, 2009); *State of NY v. Seventh Regiment Fund*, 51 A.D.3d 463, 857 N.Y.S.2d 547 (1st Dept. 2008). The City presented no evidence that it provided the Union with a copy of the 2003 memorandum or direct notice of its implementation. The record establishes that the Union did not have actual notice of the fees prior to July 2009, when OPA implemented the new check replacement fee in addition to the already existing payroll fees. Further, for the reasons set forth below, we find that the Union did not have constructive notice of the new fees prior to July 2009.

The City has asserted that the Union had constructive knowledge of the payroll fees due to the sheer length of time since their institution in 2003 and due to the distribution of a memorandum explaining the changes at that time. We reject the argument that the sheer lapse of time alone can establish constructive notice. In *UPOA,* 37 OCB 44 (BCB 1986), we held that a union's claim against a unilateral change in a policy concerning merit increases did not accrue until the Union received notice of the change and that the passage of nine years did not, of its own weight, establish

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> occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

constructive knowledge. So too here, we find that the passage of six years, standing alone, does not support a finding that the Union should have been aware of the payroll fees. Further, absent proof that the Union was sent the memorandum on July 10, 2003, when it was distributed to City agencies, that date does not commence the accrual period. *See UFA*, 77 OCB 39, at 13 (BCB 2006) (finding a union's claim did not accrue on the date a memorandum announcing policy changes was sent to City representatives; it accrued on the date the City gave that union a copy of that memorandum). As no evidence has been adduced that the memorandum was ever provided to the Union, its promulgation to City agencies does not resolve our inquiry. *Id.*

The City also argues that Union members have been paying the fees for years and that their knowledge should be imputed to the Union. A finding of constructive notice is essentially a context-specific determination of whether facts surrounding a development would reasonably have alerted a party to the development. *See Raby,* 71 OCB 14 (BCB 2003), *aff'd, Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003) (petitioner should have known that the union would not pursue her grievance after the union did not respond to her multiple attempts to discuss grievance with union); *Board of Educ. of the City School Dist. of the City of New York* 19 PERB ¶ 3015 (1986) (unreasonable to find constructive notice by requiring unions to match the Board of Education's calendars and minutes to track disposition of resolutions reported in separate documents over multiple weeks). We find that it would be unreasonable to conclude that the Union should have known about the payroll fees simply because a small fraction rank-and-file members were charged the fees.[2] Moreover, these members were under no duty to

[2] The City asserts that accessing the documents that would demonstrate that other bargaining unit members paid the fees would be burdensome. Based on the evidence submitted, however, the City has only proved that fewer than ten of the Union's 6,500 members paid the fees, which is

inform the Union of the fees.

Further, the City did not show that the Union members would have any reason to know, or could be expected to know, that the fees charged were newly implemented. In fact, the nature of the fees, that they were paid directly to OPA and only on rare and unusual occasions, suggests that it would be unlikely that Union members would even be aware that the fees were new. As PERB has held, "[t]o commence the four-month filing period, an employer need only take some action to ensure that *some responsible agent of the union* has actual or constructive knowledge of a change in prevailing terms and conditions of employment." *Otselic Valley Cent. Sch. Dist.* , 29 PERB ¶ 3005, at 3014 (1996) (emphasis added). Here, as in that case, the unrebutted testimony establishes only notice to "All Concerned Agencies," and such notice does not ensure that an agent of the Union received notice of the change. *Id.* Accordingly, we do not charge the Union with constructive notice of the payroll fees.

The evidence of record does not establish that the Union had notice, actual or constructive, of the unilaterally implemented fees before July 2009. Therefore, we find that the Union's petition is timely. Further, we find that the payroll fees are, for all relevant purposes, identical to the check replacement fee, which we have already found to be a mandatory subject of bargaining. *USA, Local 831*, 3 OCB 2d 6, at 9-12. Accordingly, we find that the City's unilateral changes violated NYCCBL § 12-306(a)(1) and (4).

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insufficient grounds to establish constructive notice to the Union.

ORDER

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

ORDERED, that the improper practice petition filed by the Uniformed Sanitationmen's Association, Local 831, I.B.T., Docket No. BCB-2788-09 be granted; and it is further

ORDERED, that the City violated NYCCBL § 12-306(a)(1) and (a)(4) by failing to bargain in good faith over its unilateral implementation of the payroll fees instituted on July 7, 2003; and it is further

ORDERED, that the City rescind its implementation of these payroll fees; and it is further

ORDERED, that the City reimburse USA's bargaining unit members charged these fees.

Dated: New York, New York
June 29, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

PETER PEPPER
MEMBER