L.831, Uni. San. Mens Ass. v. City, 35 OCB 9 (BCB 1985) [Decision No. B-9-85 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

- x

In the Matter of the Improper
Practice Proceeding

-between-

DECISION NO. B-9-85
DOCKET NO. BCB-756-85

UNIFORMED SANITATION MEN'S
ASSOCIATION LOCAL 831, I.B.T.,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

- X

INTERIM DECISION AND ORDER

The Uniformed Sanitationmen's Association, Local 831, I.B.T. (hereinafter "USA" or "the Union") filed a verified improper practice petition on January 9, 1985, in which it charged the City of New York with committing an improper practice, in violation of §1173-4.2a(4) of the New York City Collective Bargaining Law (hereinafter "NYCCBL"), by refusing to bargain collectively in good faith regarding the terms of a collective bargaining agreement to replace the agreement between the parties which expired on June 30, 1984. The City, by its Office of Municipal Labor Relations (hereinafter "OMLR"), submitted a motion to dismiss the improper practice on January 21, 1985. The Union's attorney submitted an affidavit in opposition to the motion to dismiss on

February 4, 1985. OMLR filed a pleading denominated as an "affidavit in reply to opposition to motion to dismiss" on February 13, 1985.

Background

The City and the Union are parties to a collective bargaining agreement which expired on June 30, 1984. The terms of the expired agreement remain in effect pursuant to the status quo provisions of the law, NYCCBL §1173-7.0d. The parties apparently have met on a limited number of occasions for the purpose of negotiating a new agreement.

On November 5, 1984, the City requested that the Director of the Office of Collective Bargaining (hereinafter "Director") recommend to the Board of Collective Bargaining that an impasse in negotiations exists between the City and various coalitions of employee organizations and individual employee organizations, including the USA (Docket No. 1-174-84). Following a period of mediation at the instance of the Director, the City, on December 24, 1984, renewed its request for a finding of impasse. On January 4, 1985, the Director informed the parties that he had concluded that an impasse had been reached in negotiations and that conditions were appropriate for the creation of an impasse panel or panels pursuant to the procedures set forth in the NYCCBL. The

Director further advised the parties that he would recommend that the Board of Collective Bargaining authorize the appointment of an impasse panel or panels.

The USA and the Uniformed Forces Coalition submitted objections to the Director's recommendation on January 9, and 17, 1985, respectively. The City filed letters in response on January 15 and 23, 1985. Counsel for the USA submitted a further letter addressing the issue on February 15, 1985. At the request of the Uniformed Forces Coalition, oral argument on the issue of impasse was heard by the Board on February 19, 1985. Counsel for the USA participated in the oral argument.

By decision dated February 26, 1985 (Decision No. B-6-85), this Board determined that an impasse exists in negotiations between the City and various coalitions of employee organizations and individual employee organizations, including specifically the USA, and that conditions are appropriate for the appointment of an impasse panel or panels, pursuant to the provisions of NYCCBL §1173-7.0c.

Positions of the Parties

City's Position

The City argues that the issues presented in the improper practice petition are identical to the issues

before the Board in the matter involving the City's request for the appointment of an impasse panel and the Union's opposition thereto. The City observes that the Union has alleged, both in the improper practice petition and in its written objections to the Director's recommendation of impasse, that the City has failed to bargain in good faith and prematurely has sought the appointment of an impasse panel. It is contended by the City that the USA should not be permitted to litigate these same issues in two separate and distinct actions. Since these issues already are before the Board in the impasse proceeding (Docket No. 1-174-84), the City submits that the Union's improper practice petition should be dismissed.

Moreover, the City asserts that the Director's findings and recommendation (and, presumably, the Board's confirmation thereof in Decision No. B-6-85) render moot the improper practice petition. The City argues that the Director's conclusion that negotiations have been exhausted and that conditions are appropriate for the creation of an impasse panel are dispositive of the improper practice charges. For this further reason, the City asks that the improper practice petition be dismissed.

Union's Position

The Union characterizes the City's motion to dismiss as "nonsense” and urges that it be denied. The USA notes that the City has not addressed the merits of the improper practice petition, but instead has attempted to force the Union to assert its claims in an impasse proceeding involving numerous other employee organizations and coalitions and a range of "utterly irrelevant issues".

The USA contends that its charges against the City will not be fully and fairly heard and decided by this Board within the context of the City's request for a finding of impasse. The Union submits that it must be afforded an opportunity to, demonstrate that the City's conduct in its bargaining with the USA has not been with a sincere desire to reach a negotiated agreement. The Union asserts that such a particularized inquiry into the City's conduct in its negotiations with the USA is beyond the scope of the Board's function in an impasse proceeding. Such inquiry can only be had in the context of an improper practice proceeding.

The Union further argues that in an impasse proceeding, a party should not be allowed to rely upon a state of fact created by its own misconduct. [1] Applying

---

[1]For this proposition, the Union cites Matter of City of Newburgh, 15 PERB 4723 (1982).

this principle to the present case, the Union contends that the party seeking impasse (the City) may not rely upon the alleged existence of an impasse in negotiations as a bar to examination of its misconduct in failing to bargain in good faith.

Finally, the Union suggests that if it were determined that the issues raised in the improper practice petition somehow were duplicative of issues raised in the request for impasse, such determination would not render moot the improper practice petition. The proper outcome in such a situation, alleges the Union, would not be dismissal of the petition, as requested by the City. Rather, at most, such determination might form the basis for an order consolidating this proceeding with the impasse proceeding.

For these reasons, the Union requests that the motion to dismiss be denied.

Discussion

As we read the papers submitted by the City in support of its motion to dismiss, the essence of the City's position appears to be that this Board, in considering the City's request for a declaration of impasse, and the Union's objections thereto, necessarily must consider, as well, and in fact determine the merits of

the Union's charges of failure to negotiate in good faith. We believe that the City's argument in this regard is based upon an erroneous premise.

In determining the existence of an impasse, this Board is charged with ascertaining whether collective negotiations between a public employer and a certified employee organization have been exhausted, and whether conditions are appropriate for the creation for an impasse panel.[2] However, a finding that an impasse within the meaning of the statute exists, does not imply any determination as to whether the negotiations which led up to the condition of impasse were conducted in good faith. Clearly, an impasse may exist for the very reason that one of the parties has not negotiated in good faith. Thus, in City of Newburgh v. Local 589, International Association of Firefighters [3] the Public Employment Relations Board ("PERB") affirmed a finding of impasse, holding that:

> " [t]he City's refusal to negotiate in good faith created an impasse under the Taylor Law, that is, a

---

[2]NYCCBL §1173-7.0c.(2).

[3]15 PERB 1[3116 (1982), aff'd sub nom. City of New-burg v. Public Employment Relations Board, 97 A.D.2d 258, 470 N.Y.S. 2d 799 (3d Dept. 1983).

> situation in which there was no reasonable expectation that further negotiations would be fruitful, without third-party assistance." [4]

Directing our attention to the circumstances of the present case, we find that the matter we determined upon the City's request for a declaration of impasse is not identical to the matter before us in the instant improper practice proceeding. While it is true that in both proceedings, the USA has asserted that the City has failed to bargain in good faith, our finding that an impasse exists was not a determination on the merits of the Union's claim of refusal to bargain in good faith. Our decision [5] neither considered nor determined the Union's claims that the City "engaged only in the semblance of negotiations", that it "declined to schedule or attend further meetings", that it engaged in "illusory efforts to create the semblance of bargaining", and that its conduct was "part of a deliberate plan and scheme to avoid good faith bargaining". We find that these claims appropriately are the subjects of an improper practice proceeding, not an impasse proceeding.

---

[4] Id., 15 PERB at 3180.

[5] Decision No. B-6-85 (1-174-84)

We emphasize, however, that the pendency of an improper practice proceeding does not necessarily per-clude the appointment of an impasse panel, nor bar the continuation of proceedings before a duly-appointed panel. Section 205.5(d) of the Taylor Law,[6] which is applicable to this Board pursuant to Section 212 of that Law, expressly provides that the pendency of an improper practice proceeding,

> "...shall not be used as the basis to delay or interfere with ... collective negotiations."

PERB has held that the term "negotiations" under the Taylor Law,

> "...contemplates not only face-to-face bargaining, but the full range of conciliation procedures under [Civil Service Law] §209 and under parallel provisions of local laws enacted pursuant §212" [Civil Service Law] §212." [7]

PERB has recognized that the impasse resolution procedures of the NYCCBL, which include provision for mediation, hearings before an impasse panel, and the issuance by the panel of a report and recommendation, subject to administrative review on appeal to the Board

---

[6]Civil Service Law, Article 14, §§200 et seq.

[7]Patrolmen's Benevolent Association v. City of New York, 9 PERB 13013 (1976).

of Collective Bargaining, fall within the purview of the term "negotiations". [8] In consideration of the nature of impasse procedures under the NYCCBL, PERB has ruled that the pendency of improper practice charges under §209-a.l(d) of the Taylor Law, and, indeed, an order to bargain issued as a consequence of such charges, are not necessarily inconsistent with the continuation of proceedings before an impasse panel appointed under the NYCCBL.[9]

In the same dispute referred to in the PERB decisions cited above, the Patrolmen's Benevolent Association ("PBA”) moved the Board of Collective Bargaining to stay impasse proceedings while the improper practice charges against the City were pending before PERB. We denied the PBA's motion, stating that we did not find it appropriate to stay the impasse proceedings.[10] Upon judicial review,

---

[8] Id.

[9] Id., 9 PERB ¶3013 at 3022 (1976)(interim decision); 9 PERB ¶3031 at 3060, fn. 11 (1976)(final decision and order).

[10] Decision No. B-24-75.

the court affirmed our determination, holding:

> "The fact that a PERB [improper practice] proceeding is pending does not afford a ground for suspension of impasse panel activities." [11]

In another case involving review of a determination of this Board, the court expressly stated what was implicit in the court's ruling in the Patrolmen's Benevolent Association matter, i.e., that impasse panels under the NYCCBL are "... part of the collective bargaining process.” [12]
" Thus, it seems clear that impasse proceedings under the NYCCBL are within the scope of §205.5(d) of the Taylor Law and, pursuant to that section, are not to be delayed automatically on account of the pendency of an improper practice charge.

For the reasons stated above, we find that the City's motion to dismiss should be denied. The instant improper practice proceeding shall go forward on its merits simultaneously with any impasse proceedings commenced in accordance with our determination in Decision No. B-6-85.

---

[11] Patrolmen's Benevolent Association v. Board of Collective Bargaining, N.Y.L.J. 1/2/76, p.6, 9 PERB ¶7501 (Sup. Ct., N.Y. Co., 1976).

[12] Higgins v. Anderson, 97 LRRM 2481 (Sup. Ct., N.Y. Co., 1977).

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 City's motion to dismiss the improper practice petition herein be, and the same hereby is, denied; and it is further

DIRECTED, that the City serve and file its verified answer to the improper practice petition within 10 days of receipt of this decision.

DATED: New York, N.Y.
March 27, 1985

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

JOHN D. FEERICK
MEMBER

DEAN L. SILVERBERG
MEMBER