L.621, SEIU v. Dep't of San., City, 37 OCB 17 (BCB 1986)
[Decision No. B-17-86 (IP)]

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

LOCAL 621, S.E.I.U., AFL-CIO, DECISION NO. B-17-86

Petitioner, DOCKET NO. BCB-842-86

-and-

DEPARTMENT OF SANITATION,
CITY OF NEW YORK,

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

INTERIM DECISION

A verified improper practice petition was filed by Vincent Autorino, as president of Local 621, S.E.I.U., AFL-CIO (herein "petitioner" or "Local 621") on January 13, 1986, in which it is charged that the Department of Sanitation, City of New York (herein "respondent" or "DOS") has engaged in four separate violations of Section 1173-4.1 of the New York City Collective Bargaining Law (herein "NYCCBL").

Background

The petitioner and the City have been parties to successive collective bargaining agreements, the most recent of which is effective for the period July 1,1982 to June 30, 1986 covering inter alia, employees of the Department Sanitation's Bureau of Motor Equipment (herein "BME") in the Civil Service title of Super-

visor (formerly Foreman) of Mechanics, Motor Vehicles (herein "Supervisor MMV").

On February 2, 1984, Local 621 filed an improper practice petition in Case No. BCB-693-84 which, as amended, alleges that DOS has violated the NYCCBL by:

1) creating, within the BME, a position which carries a new title, Supervisor or Ironwork, but which actually entails the same duties and responsibilities as those previously performed by a Supervisor MMV, thus removing a position from the unit represented by the petitioner;

2) creating, within the BME, so-called managerial positions which carry the new titles of Deputy Director and Director, but which actually entail the same duties and responsibilities as those previously performed by Supervisors MMV with the "office" titles of Assistant Chief and Chief, thus removing additional positions from the unit represented by the petitioner; and

3) bypassing Local 621, the certified representative of the Supervisors MMV, and offering directly to those employees higher rates of pay and other benefits in order to induce them to accept the new nonunit positions.

The petitioner alleges that the City engaged in the above actions in retaliation for the filing of two

previous improper practice petitions, although the two cases more ultimately resolved without hearing

A hearing on the above allegations commenced on June 4, 1984 and continued on ten succeeding hearing dates through October 1. 1985. The hearing has not resumed since that time due to the death of the hearing officer, Professor Joseph T. Crowley. The petitioner's chief counsel, Murray Gordon, has also died since the last hearing date.

The Instant Petition

The petitioner in the instant case, BCB-842-86, alleges that the Sanitation Department has interfered with its rights under Section 1172-4.1 of the NYCCBL, and has violated the NYCCBL by the following actions:

1) Continuing the conduct alleged in Case No.BCB-693-84, i.e., offering and appointing two more unit Supervisors MMV to the new Deputy Director positions; and appointing to the new Director title a Supervisor MMV who, it was alleged in BCB-693-84, had been unlawfully offered a Deputy Director position

2) "Repeatedly" refusing to comply with the posting provisions of Article VII of the collective bargaining agreement, and denying all grievances filed alleging such violations;

3) Refusing to fill vacancies in the position of Supervisor MMV because of the pendency of unresolved improper practice charges in case No. BCB-693-84;

4) Refusing to allow Local 621 to participate on the DOS labor-management team under the same terms and conditions as other labor organizations are permitted to participate; specifically, by preventing petitioner's president, Autorino, from attending meetings of this committee.

The City's Position

With respect to the first allegation, concerning the appointment of Supervisors MMV to the new titles of Deputy Director and Director, the City takes the same position as it did in its Answer in Case No. BCB-693-84, namely that Section 1173-4.3(b) of the NYCCBL reserves to management the "absolute right to establish civil service titles and corresponding job specifications," and that, accordingly, a violation of the NYCCBL has not been stated.

With respect to the second allegation concerning failure to comply with posting requirements of the contract, the City asserts that, inasmuch as petitioner. has executed waivers in connection with all such disputes submitted to arbitration, it is precluded from

litigation of the same claim in improper, proceeding.

Although the City denies all allegations of the instant petition and asserts that they are "essentially duplicative" of those in BCB-693-84, it does not on this position with respect to the allegations concerning failure to fill Supervisor MMV positions and refusal to allow Local 621's president to serve on the labor management team.

The Petitioner's Position

The petitioner takes the position that the allegations of promotions to Deputy Director and Director are merely a continuation of the conduct alleged as unlawful in Case No. BCB-693-84, and that, as such, they constitute a continuation, or pattern, cf improper practices.

The petitioner asserts that the second allegation is not merely a claim of contract violation, but constitutes an improper practice as well because the violations of the contract and the denials of ensuing grievances are motivated by animus against Local 621. The petitioner states that due to the period of time it generally takes to process a grievance through arbitration, even though petitioner prevails, "meaningful

relief is sometimes impossible." Consequently, petitioner "seeks an order which will cause respondents to cease their practice of disregarding the contract."

The petitioner denies that the allegations are "duplicative" which concern refusal to fill Supervisor MMV vacancies and refusal to allow Local 621's president to participate in the labor management team. Rather, petitioner asserts, the actions complained of form part of a continuing pattern of discrimination and harassment.

Discussion

We find that the allegation concerning appointment of Supervisors MMV to the managerial titles of Deputy Director and Directors does, on its face, involve the same conduct alleged in the prior case, BCB-693-84. Inasmuch as the alleged improper practice arises from additional instances of the conduct previously alleged as to which a hearing is in progress, we find that it is appropriate that the instant case be consolidated with BCB-693-84 for the purpose of hearing on this issue. In so doing, we note that consolidation of the two cases for the purpose of hearing is in accordance with the wishes of the parties.

With respect to petitioner's contention that the City's alleged repeated violations of contractual posting

requirements make out a violation of NYCCBL, Section 205-5(d)of the Taylor Law[1] specifically state that the Board

> shall not have the authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employer organi-zation practice.

Thus, we are precluded from asserting jurisdiction and dismiss the petition insofar as this allegation is concerned.[2]

Petitioner alleges that DOS has "refused" to fill Supervisor MMV vacancies at the BME because of the pendency of improper practice charges, and that this constitutes discrimination against Local 621. This allegation, however, is a mere conclusion, No facts are alleged indicating what vacancies have occurred, when they have occurred, or how leaving them vacant has discriminated against

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[1] N.Y. CIv. Serv. Law, Art. 14, as amended. Section 205.5(d) of the Taylor Law is made applicable to the Board of Collective Bargaining by Section 212 of that law.

[2] Decision No. B-3-85, fn.2; Administrative Board of the Judicial Conference of the State of New York, 6 PERB 3013 (1973); Schalmont Central School District, Hearing Officer's Decision, 14 PERB 4596 (1981).

any employee. For this reason, we are compelled to dismiss the instant improper practice petition insofar as it relates to the City's failure to fill Supervisor MMV vacancies.[3]

Finally, petitioner alleges that Local 621 has been subjected to disparate treatment with respect to participation on the departmental labor-management team by DOS's refusal to accept as a member the petitioner's designated representative. In as much as the City did not respond specifically to these allegations, and considering that such conduct, if established, may constitute a violation of Section 1173-4.2a(4) of the NYCCBL,[4] we find that issues of fact exist appropriate for resolution by hearing. Accordingly, we will direct that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining for the purpose of establishing a record upon which we may ascertain whether an improper practice within the meaning of the NYCCBL has taken place.

In as much as this issue involves the same parties and, potentially, some of the same witnesses, and is

[3] See, e.g., B-7-86, B-12-85, B-35-80, B-14-80.

[4] See, e.g., Lufkin Telephone Exchange Inc., 191 N.L.R.B. 856, 77 L.R.R.M. 1488 (1971).

closely related to the issues already under consideration, we find that it is appropriate that the instant case be consolidated with BCB-693-84 for the purpose of hearing on this issue as well as, on the issue of appointments to new titles.

In reviewing the allegations and proceedings involved in Cases Nos. BCB-693-84 and BCB-842-86, we have perceived a need to clarify the issues. We believe that this is appropriate in view of the special circumstances surrounding these cases, particularly the consolidation of issues, the hiatus in the hearing and changes in trial examiner and counsel necessitated by the unfortunate deaths of Messrs. Crowley and Gordon. We believe that clarification will enable all the parties to focus on the relevant issues and will thus make it possible to bring this proceeding to a timely conclusion.

In these cases, the petitioner alleges that the DOS has discriminated against the Union and has interfered with the employees' Section 1173-4.1 rights. The petitioner does not, however, specify which of the improper practices enumerated in Section 1173-4.2 the

City may have committed.[5]

The primary allegation of both petitions is that the City has created new titles and has thereby removed employees from the unit represented by petitioner for the purpose of retaliating against petitioner for the filing of improper practice petitions and grievances. The gravamen of these allegations is that the City has violated Section 1173-4.2a(l) of the NYCCBL.

Turning to the allegation of Case No. BCB-693-84 that the City bypassed the petitioner and offered unit members increased wages and benefits to induce them

[5] Section 1173-4.2(a) reads as follows:

> 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.

to accept the new job titles, we find that the gravamen of this charge is a refusal to bargain in violation of Section 1173-4.2a(4) of the NYCCBL. The resolution of this allegation depends upon our finding with respect to the creation of the nonunit positions.

The final allegation with respect to the alleged refusal to permit petitioner's president to serve on the DOS labor management committee also states a violation under Section 1173-4.2a(4) of the **NYCCBL**. This allegation may be sustained independently of the other two if supported by credible evidence.

0 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 in Case No. BCB-842-86 by Local 621, S.E.I.U., AFL-CIO be, and the same hereby is, dismissed insofar as it alleges violations of the NYCCBL based on the respondent's violation of contractual posting requirements and failure to fill Supervisor MMV vacancies; and it is further

ORDERED, that to the extent the petition alleges violations of the NYCCBL by the creation of and appointments to nonunit titles and refusal to bargain with the Union's designated representative, it is referred to a Trial Examiner designated by the Office

of Collective Bargaining for the purpose of conducting a hearing and establishing a record upon which this Board may determine whether an improper practice has occurred.

DATED: New York, N.Y.
March 25, 1986

ARVID ANDERSON
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