DC 37, 4 OCB2d 10 (BCB 2011)

(IP) (Docket No. BCB-2864-10).

Summary of Decision: The City alleged that the Union violated its duty to bargain in good faith under NYCCBL §§ 12-306(b)(2) and (c)(4). The City claimed that the Union entered an agreement with no intention of honoring it and failed to provide information necessary for the administration of the agreement's provisions. The Union argued that the Board should defer the dispute to arbitration, and that, in the alternative, the City failed to state a claim upon which relief may be granted. Because the agreement is the ultimate source of the rights asserted and arbitration will resolve all of the claims, the Board deferred the matter to arbitration. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE CITY OF NEW YORK,

Petitioner,

- and -

DISTRICT COUNCIL 37, AFSCME, AFL-CIO

Respondents.

DECISION AND ORDER

On June 2, 2010, the City of New York ("City") filed a verified improper practice petition alleging that District Council 37, AFSCME, AFL-CIO ("Union") violated its duty to bargain in good faith under §§ 12-306(b)(2) and (c)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City claims that the Union engaged in bad faith bargaining by entering into an agreement with no intention of honoring it and

by failing to provide information necessary for the administration of the agreement's provisions. The Union argues that the Board should defer the dispute to arbitration, and that, in the alternative, the City has failed to state a claim upon which relief may be granted. Because the agreement is the ultimate source of the rights asserted and arbitration of the underlying contractual dispute will resolve all of the claims, the Board defers the matter to arbitration.

BACKGROUND

On October 30, 2008, the City and the Union entered into the 2008 District Council 37 Memorandum of Economic Agreement ("2008 DC 37 MEA"), whose term is from the expiration of the applicable predecessor separate unit agreement to the date on which the City and the Union enter a Successor Separate Unit Agreement. Sections 4(c)(ii) and (iii) of the 2008 DC 37 MEA, titled "General Wage Increase," provide in pertinent part:

> **ii.** Effective on the last day of the *Successor Separate Unit Agreement*, the general increases provided for in subsections 4. (a)(i) and 4. (a)(ii) shall be applied to "additions to gross." "Additions to gross" shall be defined to include uniform allowances, equipment allowances, transportation allowances, uniform maintenance allowance, assignment differentials, service increments, longevity differentials, longevity increments, advancement increases, assignment (level) increases, and experience, certification, educational, license, evening or night shift differentials.
>
> **iii.** Notwithstanding Section 4(c)(ii) above, the total cost of the increase set forth in 4(c)(i) as it applies to "additions to gross" shall not exceed a cost of .10 percent of the December 31, 2007 payroll, including spinoffs and pensions. Recurring increment payments are excluded from this provision.

(Pet. Ex. A, at 2-3) (emphasis in original).

On January 7, 2009, the City sent the Union a document stating that it had computed that the

general wage increases to the additions to gross would exceed .10% of the December 31, 2007 payroll. The Union acknowledges that it received this document, but asserts that the City based its figures in that document on the December 2005 payroll, instead of the 2007 payroll. The Union notes that under the prior MEAs for 1995-2000, 2000-2002, 2002-2005 and 2005-2008, the City never engaged in a costing exercise with the Union; instead, it paid the increases to additions to gross as a matter of course.

On January 20, 2010, the City and the Union met to discuss how to apply the additions to gross to Union members. During this meeting, the City informed the Union that it was required to remain within the .10% net cost constraint of 4(c)(iii). The Union alleges that, at that time, it alerted the City that the City had performed an inaccurate evaluation of the December 2007 payroll. It is undisputed, however, that the Union failed to choose, as the City requested, a manner in which the City should apply 4(c)(ii) to the various additions to gross while remaining in the cost parameters of 4(c)(iii).

The City and the Union met again on March 26, 2010, to discuss how to apply 4(c)(ii) of the 2008 DC 37 MEA to the various additions to gross while remaining in compliance with 4(c)(iii). The City maintains that, during this meeting, the Union's Director of Research and Negotiations insisted on the full general wage increases and stated that labor relations and negotiations were "broken." The Union asserts that it requested the City to provide the actual numbers that the City had paid in additions to gross in 2007 and stated that the City needed to perform an accurate costing. The Union allegedly informed the City that it would seek resolution of the dispute by a third party to determine the .10% value. Again, the Union did not choose a means by which the City could apply 4(c)(ii) to the various additions to gross while remaining within the cost parameters of 4(c)(iii).

As of July 19, 2010, the Union had not made such an election.

On May 7, 2010, the Union filed a request for arbitration to determine "[w]hether the City of New York has violated the terms of Section 4(c)(ii) of the Agreement by failing and refusing to apply the general increases provided for in subsections 4(a)(i) and 4(a)(ii)[1] to 'additions to gross.'" The City filed a petition challenging arbitrability, docketed as BCB No. 2860-10, on May 21, 2010, which is pending before the Board. The City filed the instant verified improper practice petition on June 2, 2010.

Section 3 of the 2008 DC 37 MEA, titled "Prohibition of Further Economic Demands," states that "[n]o Party to this agreement shall make additional economic demands during the term of the *2008 DC 37 MEA* or during negotiations for the applicable *Successor Separate Unit Agreement*. Any dispute hereunder shall be promptly submitted and resolved." (Pet. Ex. A, at 2) (emphasis in original).

POSITIONS OF THE PARTIES

City's Position

The City asserts that the Union violated NYCCBL § 12-306(b)(2). Specifically, the City

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[1]Section 4 of the 2008 DC 37 MEA provides in pertinent part:

a. The general wage increases, effective as indicated, shall be:

> **i.** Effective on the first day of the applicable *Successor Separate Unit Agreement*, Employees shall receive a general increase of 4%.
>
> **ii.** Effective on the first day of the thirteenth month of the applicable *Successor Separate Unit Agreement*, Employees shall receive an additional general increase of 4%.

(Pet. Ex. A) (emphasis in original).

maintains that the Union failed to bargain collectively in good faith with the City by agreeing to a provision in the 2008 DC 37 MEA that it had no intention of honoring. The City argues that the Union demonstrated bad faith in bargaining because its subsequent actions show that it had no intention of limiting its additions to gross to the .10% threshold set forth in 4(c)(iii) of the 2008 DC 37 MEA. Despite several meetings, the Union never informed the City how to apply 4(c)(ii) to the various additions to gross while remaining in compliance with 4(c)(iii). The City asserts that the costing it provided on January 7, 2009, is the most accurate measurement available, and has been performed in the same manner for other unions and for this Union on other issues. The Union's decision to file its request for arbitration in May further demonstrates the Union's bad faith. Thus, the Union's words and pattern of delay indicate that the Union never had any intention of complying with 4(c)(iii).

Second, the City argues that the Union violated NYCCBL §§ 12-306(b)(2) and (c)(4) when it failed to provide information to the City that was necessary for the administration of the 2008 DC 37 MEA's provisions. Section 12-306(c) requires the certified public employee organization "(1) to approach the negotiations with a sincere resolve to reach an agreement; . . . [and] (4) to furnish to the other party upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." Here, the City made several requests that the Union identify how the City should allocate the money to comply with the .10% limit, but received no response from the Union. Without this information, the City maintains that it cannot administer the 2008 DC 37 MEA. This constitutes a violation of the NYCCBL.

Last, the City argues that the Board should not defer this matter to arbitration. The allegations

at issue are pure improper practice claims and fall only within the jurisdiction of the Board. Although the Union has requested deferral, it has failed to provide a specific allegation or discussion of how the City's claim constitutes a contractual claim that arbitration will remedy.

Union's Position

The Union requests that the Board defer the dispute to arbitration. The Union argues that the Board should defer claims to arbitration where, as here, arbitration provides an appropriate means of resolving a dispute arising from, and requiring interpretation of, a collective bargaining agreement. The Union filed a request for arbitration on its claim that the City failed to pay the increase in the additions to gross as set forth in the 2008 DC 37 MEA because the parties disputed how the value of the .10% should be determined during the two meetings in 2010. The City based its valuation of the .10% on a payroll that only included titles for Mayoral agencies and the Department of Education. The Union objected to this methodology and sought the inclusion of all eligible titles of covered employers, including those at the Health and Hospitals Corporation, the New York City Housing Authority, the cultural institutions and the public libraries in the .10% valuation. Moreover, the City's improper practice allegations that the Union is insisting that no costing be performed and failing to tell the City how to allocate the .10% of funds directly relates to whether there has been a contractual violation. The Union, in its request for arbitration, claims that the City has failed to pay a benefit to which its members are entitled; because adjudication of this underlying dispute would resolve the instant matter, the Board should defer the instant petition.

The Union also contends that the City fails to state a claim upon which relief may be granted. The Union denies that the City has set forth facts amounting to bad faith. The Union asserts that it has not shown an "intransigent, insincere, and cavalier attitude toward the negotiations" as required

to establish bad faith; rather, it claims to, in good faith, disagree with the City's understanding of the 2008 DC 37 MEA. Therefore, the improper practice petition should be deferred and/or dismissed.

DISCUSSION

Although this Board has exclusive jurisdiction under NYCCBL § 12-309(a)(4) to prevent and remedy improper practices, we will typically defer disputes "where the circumstances are such that the contractual arbitration procedure provides an appropriate means of resolving the matter, consistent with the declared policy of the NYCCBL to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations." *Local 1508, DC 37*, 79 OCB 21, at 21 (BCB 2007) (internal quotations omitted). This Board will, therefore, defer improper practice claims where the allegations "arise from and require interpretation of a collective bargaining agreement and in cases where it appears that arbitration would resolve both the claims that arise under the NYCCBL and the agreement." *DC 37*, 1 OCB2d 4, at 8-10 (BCB 2008); *CSBA, L. 237,* 71 OCB 24, at 10-11 (BCB 2003). Where an improper practice claim exists that would not be resolved by the arbitration of the contractual claims arising out of the same transactions, we have held that "such statutory claims are committed to adjudication under the NYCCBL rather than the arbitral forum." *ADW/DWA*, 3 OCB2d 8, at 12 (BCB 2010).

Here, the grievance filed by the Union raises the question of whether the City violated § 4(c)(ii) of the 2008 DC 37 MEA by failing to apply the general increases to additions to gross provided for in subsections 4(a)(i) and (ii). This requires an analysis and interpretation of 4(c)(ii) and (iii), as well as interpretation of the meaning of ".10%" under the 2008 DC 37 MEA. These exact transactions underlie the Union's and the City's dispute in the instant improper practice petition over

what was required in order to comply with the provisions of the 2008 DC 37 MEA, and are the ultimate source of the rights alleged. Specifically, the Union's alleged non-compliance with 4(c)(iii) and failure to provide information on how to allocate the .10% of funds are inextricably tied to the Union's interpretation of the ".10%," and the City's valuation of the ".10%." Moreover, the alleged willfulness of the Union's refusal to comply with the 2008 DC 37 MEA, as the City sees it, is the sole basis for the claim of bad faith bargaining. Thus, because both the grievance and the instant petition turn on the meaning of these provisions of the 2008 DC 37 MEA, and how to apply them, arbitration will fully resolve the claims asserted, warranting deferral. *See PBA*, 1 OCB2d 14, at 14 (BCB 2008) ("[T]he Board will 'defer improper practice claims where the improper practice allegations arise from and require interpretation of a collective bargaining agreement and in cases where it appears that arbitration would resolve both the claims that arise under the NYCCBL and the agreement.'") (quoting DC 37, 1 OCB2d 4, at 8-10); *see also NYSNA*, 3 OCB2d 36, at 12 (BCB 2010) ("The Board will not . . . stand in place of an arbitrator."); *DC 37, L. 1508*, 77 OCB 23, at 13 (leaving interpretation of the collective bargaining agreements to the arbitrator); *Local 3, I.B.E.W.*, 37 OCB 45 (BCB 1986) (deferring an improper practice claim to arbitration because the grievance concerned the same issues raised in the petition).

Because the issue before us is based upon, and requires interpretation of, the parties' collective bargaining agreement, and is the subject of a pending grievance, we defer the issue to the arbitrator. The deferral is without prejudice to reopen the charge should the Union raise any argument that forecloses a determination on the merits of the grievance during the arbitration or should any award be repugnant to rights under the NYCCBL. *See CIR, SEIU*, 67 OCB 40, at 7 (BCB 2001).

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, docketed as BCB-2864-10, filed by the City of New York, be, and the same hereby is, deferred until such time as an arbitrator renders a determination and issues an opinion and award upon which this Board may further determine whether an improper practice was committed by the Union.

Dated: February 14, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER