CSA, 4 OCB2d 32 (BCB 2011)

(IP) (Docket No. BCB-2927-11).

Summary of Decision*:** The City moved to dismiss a Petition requesting that the Board find that the City and ACS violated NYCCBL § 12-306(a)(4) by failing to bargain in good faith in or, in the alternative, order that the parties submit to impasse proceedings. The City argued that the Board lacks jurisdiction because the NLRB has asserted jurisdiction over the day care centers that employ the Union's members and, further, that the Union's members are not public employees as defined by the NYCCBL. The Union argued that the intervention of the Board is required to effectuate the public policy of the NYCCBL, that the City employs its members, and that the Board's jurisdiction has not been preempted by the NLRB. The Board found that it lacked jurisdiction because the Union's members are employed by a non-public employer. Accordingly, the City's Motion was granted, and the Union's Petition was dismissed. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

COUNCIL OF SCHOOL SUPERVISORS AND ADMINISTRATORS,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY ADMINISTRATION FOR CHILDREN SERVICES,

Respondents.

DECISION AND ORDER

On March 2, 2011, the New York City Office of Labor Relations ("OLR"), on behalf of the City of New York ("City") and the New York City Administration for Children Services ("ACS"), filed a Motion to Dismiss ("Motion") a verified Improper Practice Petition filed by the Council of School Supervisors and Administrators ("Union" or "CSA") on January 25, 2011. The Union

alleges that the City and ACS failed to bargain in good faith over the terms and conditions of employment for certain titles employed in day care centers, in violation of § 12-306(a)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") or, in the alternative, that the parties have negotiated to impasse. The City argues that the Board lacks jurisdiction because the National Labor Relations Board ("NLRB") has asserted jurisdiction over the day care centers that employ the Union's members and, further, that the Union's members are not public employees as defined by the NYCCBL. The Union argues that the intervention of the Board is required to effectuate the public policy of the NYCCBL, that the City employs its members, and that the Board's jurisdiction has not been preempted by the NLRB. This Board finds that it lacks jurisdiction over the instant Petition because the Union's members are employed by a non-public employer. Accordingly, the Motion is granted, and the Petition is dismissed.

BACKGROUND

The Union is an employee organization, certified by the New York State Employment Relations Board ("SERB") in 1974.[1] It represents approximately 375 employees in the titles Director and Assistant Director in day care centers located throughout the City. The Union and the Day Care Council of New York ("DCC") are signatories to a collective bargaining agreement covering Directors and Assistant Directors for the period of April 1, 2001, through June 30, 2006 ("2001 Agreement"). Over 99% of DCC's funding comes from the City and the Union alleges that DCC

[1] In New York state, prior to July 2010, private industry employers appeared before SERB, while public employers appeared before the New York State Public Employment Relations Board ("PERB"). In 2010, PERB assumed the responsibilities previously performed by SERB.

is an agent of the City. DCC was incorporated as a not-for-profit corporation in New York State in 1953 and is a federation comprised of 200 non-profit organizations, operating over 320 publically funded day care centers in the City.[2] The individual day care centers that comprise DCC enter into contracts with ACS that set the terms and conditions under which the day care centers operate. The Union describes the day care centers as being managed by ACS, and submitted a Purchase of Child Care Services Agreement ("Purchase Agreement") between ACS and a day care center member of DCC to illustrate ACS's managerial control.[3] In the Purchase Agreement, the day care center covenanted that it was an independent contractor and that its employees were not employed by the City.[4]

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[2] DCC is not a party to the instant action. We take administrative notice of its filing with the New York State Department of State as to its incorporation status.

[3] Purchase Agreement, Part IIA, Article 1, § 3, states that the day care center "shall comply with those actions that ACS shall request." (Union's Memorandum of Law, Ex. 1). The City sets the hours of operation of the day care center and requires that the day care center serve food "in accordance with ACS guidelines." (*Id.* at Part IIA, Article 1, § 9(b)). The Purchase Agreement has many provisions regarding the day care center's financials, including a clause limiting to $50 the amount of petty cash that the center can maintain (Part IIA, Article 5, § 2(b)). Regarding personnel decisions, the Purchase Agreement requires that the day care center conduct specific background checks (Part IIA, Article 13, § 1(a)) and submit copies of all employment applications to ACS (Part IIA, Article 13, § 1(e)). Further, ACS retains the right to withhold funds for any budgeted position filled by an employee that does not meet ACS' requirements (Part IIA, Article 13, § 1(h)).

[4] The Purchase Agreement, Part IIB, Article 5, § 1, states taht: "All experts or consultants or employees of the [day care center] who are employed by the [day care center] to perform work under this Agreement are neither employees of the City nor under contract with the City and the [day care center] alone is responsible for their work, direction, compensation and personal conduct while engaged in this Agreement." (Union's Memorandum of Law, Ex. 1). The Purchase Agreement further states that the day care center "is an independent contractor, and not an employee of [ACS] or the [City] . . . and that . . . neither it nor its employees and agents will hold themselves out as, nor claim to be, . . . employees of the [City] . . . and that they will not . . . make any claim, demand or application to or for any right or privilege applicable to an . . . employee of the [City] . . ." (*Id.* at Part IIB, Article 5, § 4).

Since March 2006, the Union has been attempting to negotiate a successor to its 2001 Agreement with DCC. Numerous meetings have been held at OLR that were attended by representatives of OLR, DCC, ACS, the Union, and the Office of Management and Budget. In March 2007, in response to the Union's economic proposals, DCC stated that economic proposals are for the City to negotiate because the City funds the day care centers. On May 4, 2007, the Union and DCC jointly wrote to the OLR Commissioner requesting that OLR and ACS "participate in negotiations." (Pet., Ex. B). In December 2008, in response to the Union's economic proposals, representatives of the City and DCC again stated that DCC was not authorized to address economic proposals because all decisions concerning economic proposals are made by the City, not DCC.

On July 7, 2009, DCC wrote the Union, stating that "it is unable to continue negotiations concerning CSA's economic proposals until it is advised by the [City] as to the amount of additional monies, if any, it will make available to member day care centers." (Pet., Ex. F). DCC noted that its "centers are fully dependent . . . [upon] the City, they do not have independent financial resources to engage in meaningful bargaining." (*Id.*). DCC stated that it had no counter-proposals and, unless the City provides "additional funding, there are no economic proposals that [DCC] can make in response." (*Id.*). In an August 2009 meeting with the Union, OLR described itself as a funding partner of DCC but stated that it was not negotiating with the Union; it was merely facilitating negotiations between DCC and the Union.

In November 2009, the Union requested that DCC submit to binding arbitration and filed an Unfair Labor Charge with SERB, naming DCC as the employer, and alleging that DCC has engaged in "surface bargaining with CSA under the premise that they have no control over funding the contract." (Motion, Ex. 1). The Unfair Labor Charge also stated that the "City, as the 'funding

partner' with DCC, has failed to negotiate in good faith." (*Id.*).

DCC responded to the Request for Arbitration on December 28, 2009. In a letter to the Union's President, DCC's Executive Director wrote that "in light of the central role the City has" he "was surprised by [the Union's] proposal" because arbitration "would clearly be futile" as an arbitrator's award would not be binding on the City, which "would have no obligation to fund it." (Pet., Ex. G). DCC's Executive Director noted that DCC was "as frustrated as [the Union] by the inability of the City to provide the parties with the financial resources needed to complete negotiations." (*Id.*). Further, if DCC had "the financial means to grant a wage increase, [it] would have done so long ago" but it is "not financially independent of the City and must rely upon City funding to operate their child care centers." (*Id.*). On January 27, 2010, the Union forwarded DCC's December 28, 2009 letter to the OLR Commissioner and requested "that the City agree to participate and be bound by an arbitration panel's decision." (Pet., Ex. H).

On July 1, 2010, without issuing an opinion, SERB dismissed the Unfair Labor Charge against DCC. (Motion, Ex. 3).

The Union filed the instant Improper Practice Petition on January 25, 2011, requesting that the Board order the City to bargain in good faith or, in the alternative, order that the parties submit to impasse proceedings.

POSITIONS OF THE PARTIES

City's Position

The City argues that the NLRB's assertion of jurisdiction over the day care centers that comprise DCC preempts the Board from hearing the Improper Practice Petition. The City cites

Local 32B-32J, SEIU, 25 OCB 24, at 6 (BCB 1980), in which the Board held that "in light of the decisions of the NLRB to assert jurisdiction . . ., we find that we are preempted from hearing and deciding [the union's] improper practice petition." The City also cites a series of NLRB cases establishing the NLRB's jurisdiction over day care centers, including those that comprise DCC. In *Cardinal McClosky Children's and Family Services, et al.*, 298 NLRB 434 (1990), the NLRB asserted jurisdiction over 11 DCC members. More recently, the NLRB asserted jurisdiction over DCC members in 2002 and 2008. *See Staten Island Children's Council, Inc.*, 2002 NLRB LEXIS 115 (2002); *Horace E. Green Day Care Center*, 2008 NLRB LEXIS 236 (2008).

The City also argues that the Directors and Assistant Directors represented by the Union are not public employees as defined by the NYCCBL because they are employed by the individual day care centers that comprise DCC and, therefore, are not employees of the City or ACS. That the individual DCC members have contracts with ACS does not make the employees of those day care centers, or employees of DCC, public employees. To the contrary, the Purchase Agreement introduced by the Union explicitly states that the day care center employees are not employees of the City. The City also cites to *Staten Island Children's Council, Inc.*, in which the NLRB found that employees of day care centers that comprise DCC are employees of the day care centers, not ACS, even though they provide day care services to ACS.

Union's Position

The Union contends that the intervention of the Board is required to effectuate the public policy of the NYCCBL, stated in § 12-302, to "favor and encourage the right of municipal employees to organize and be represented." DCC lacks control of the purse strings, and thus has no meaningful control over bargaining. The City has "robbed" the Union's members of their right to be

represented, and is "cheating" them out of their right to bargain, by making meaningful negotiations impossible. It is therefore critical that the Board exercise jurisdiction to uphold the vital purpose of the NYCCBL.

The Union argues that the "question . . . is not whether the employees involved are employees of the City government for every conceivable purpose but, whether there exists a public employer-public employee relationship such as contemplated by the NYCCBL." (Union's Memorandum of Law at 4) (quoting *Local 1115, Empl. Union*, 8 OCB 22, at 9 (BOC 1971)). It is undisputed that ACS is a municipal agency, as defined by NYCCBL § 12-303(d), and that the City is a public employer, as defined by NYCCBL § 12-303(g). The City provides the funding to the day care centers; thus, the Union's members are paid out of the City treasury. The Board has previously "found public employee status by looking at the source of operating funds and financial control for the purpose of negotiations." (*Id.*) (citing *Local 1115, Empl. Union*, 8 OCB 22, and *Legal Serv. Staff Assn.*, 12 OCB 48 (BOC 1973)). DCC could only sign a contract after the City approved it. Since "DCC is merely the agent of the City . . . it is the City that is bound by an employment relationship with CSA, not DCC." (*Id.* at 4-5). Further, the Purchase Agreement submitted establishes that the City sets the terms and conditions under which the day care centers operate, making the City the "ultimate decision maker regarding personnel issues." (*Id.* at 8). Thus, the Union has made a *prima facie* showing that its members are public employees.

The Union further argues that the City's argument that the NLRB's assertion of jurisdiction over day care centers that comprise DCC preempts the Board is "fatally flawed." (*Id.* at 9). The cases relied upon by the City are "inadequate to constrain the Board from hearing" a case such as the instant matter, which "is precisely meant to be addressed by the NYCCBL." (*Id.*). *Cardinal*

McClosky Children's and Family Services "is not instructive" as it turned upon the NLRB's finding that the individuals at issue were independent contractors, not employees, an issue not raised in this case. (*Id.*). The City's reliance on *Staten Island Children's Council, Inc.*, and *Horace E. Green Day Care Center* is misplaced as those cases did not address whether "DCC's power to negotiate on behalf of the day care center was choked by the City's control as it is in this case." (*Id.*). That is, it would be a inequitable to find that the City is not the employer because DCC is the named bargaining representative. To do so "would allow the City to hide behind its agency relationship with DCC when in truth, the City's actions prevented any meaningful bargaining on behalf of the day care centers." (*Id.*).

The Union argues that *Local 32B-32J, SEIU*, is not controlling because it turned on a finding that "the City and the vendors have expressly agreed that the vendors will be the sole employers." (*Id.* at 10) (quoting *Local 32B-32J, SEIU*, 25 OCB 24, at 4) (quoting *Local144*, 26 OCB 20 (BOC 1980)). No such agreement exists in the instant case. To the contrary, the facts here demonstrate that the City intends to maintain control over the employment relationship. Thus, the Board should not defer to the NRLB and should exercise jurisdiction and hear this case.

DISCUSSION

The parties' contentions have properly raised before this Board a jurisdictional question. We agree with the City's contention that the employees at issue cannot be deemed "public employees" as defined in the NYCCBL, which is limited by § 12-303(h) to "municipal employees and employees of other the public employers." DCC is clearly an employer, if not the sole employer, of the employees at issue in this matter. The Union named DCC as the employer in the Unfair Labor

Charge it filed with SERB, the 2001 Agreement is between DCC and the Union, and the Union has alleged that DCC would be a signatory to a successor agreement. Because governing Court of Appeals precedent, as well as the language of the NYCCBL, clearly excludes DCC from the definition of "public employer," its employees are consequently excluded from the definition of "public employees." Thus, we are constrained to find that we do not have jurisdiction over the instant matter.[5]

The Court of Appeals has held that PERB's jurisdiction under the Taylor Law is limited to public employers, explaining that:

> It is not necessary to determine, and it should not be determined at this time in this case, whether the so-called Taylor Law [] is intended to cover only those employees excluded from the jurisdiction of the [NLRA], although that may well be the effect of the several applicable statutes. *It is enough that the New York Public Library is not a public employer, joint or otherwise, within the terms or effect of the Taylor Law.* The short of it is that the instant public library

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[5] The scope of the NYCCBL is set out in § 12-304, which reads that it shall be applicable to:

> a. All municipal agencies and to the public employees and public employees organizations thereof; b. any agency or public employer, and the public employees and public employee organizations thereof, which have been made subject to this chapter by state law; c. any other public employer, and to the public employees and public employee organizations thereof, upon the election by the public employer or the head thereof by executive order of the chief executive officer to make this chapter applicable, subject to approval by the mayor, provided, however, that any such election by the [City] board of education shall not include any teacher as defined in [§] 13-501 of the administrative code or any employee who works in that capacity or any paraprofessional employees with teaching functions; and d. any public employer, and the public employees and public employee organizations thereof, to whom the provisions of this chapter are made applicable pursuant to paragraph four of subdivision c of [§] 12-309 of this chapter.

> employment satisfies in some respects the character of public employment and in other substantial respects does not, and that the Taylor Law applies only to employment which is unequivocally or substantially public. [The opinion below] demonstrates the nonpublic aspect of library employment is sufficiently substantial to exclude it from regulation under the Taylor Law, as it now reads.

Matter of New York Pub. Lib., Astor, Lenox and Tilden Foundations v. New York State Pub. Empl. Relations Bd., 37 N.Y.2d 752, 753 (1975) ("*New York Public Library*") (emphasis added) (citations and internal quotation marks omitted).

The genesis of *New York Public Library* was an improper practice petition filed with PERB against the New York Public Library ("Library"). *See Matter of New York Pub. Lib. v. Pub. Empl. Relations Bd.*, 45 A.D.2d 271, 272-273 (1st Dept 1975), *affd*, 37 N.Y.2d 752 (1975) (in depth description of PERB proceedings). The City took no part in the initial hearing before PERB, and the parties stipulated that the Library was the sole employer. The PERB hearing officer concluded that the Library was not a public employer within the meaning of the Taylor Law and, thus, PERB lacked jurisdiction. When objections to the hearing officer's report were taken, the City intervened and requested that PERB determine "that the City is a joint public employer with the respondent [Library]." 45 A.D.2d at 272-73 (quoting City's letter to PERB).[6] A majority of the PERB Board found the City to be a joint employer with the Library, reversed the hearing officer, and held that PERB had jurisdiction. PERB stated that the public employer status of the Library was irrelevant but indicated, in a footnote, that if PERB were to reach that question, it would find the Library to be a public employer. One PERB Board member dissented, finding the Library to be neither a public employer nor part of a joint public employer. Despite finding that it had jurisdiction, PERB initially

[6] The Taylor Law recognizes joint public employers. *See* Taylor Law § 201(6)(b).

declined to exercise its jurisdiction in light of § 205.5(d) of the Civil Service Law ("CSL"), which made the City subject to the jurisdiction the Board of Collective Bargaining. When this Board's jurisdiction under CSL § 205.5(d) expired without the Board issuing any determination in the matter, PERB reasserted jurisdiction and upheld the charge. *Id.*

The Appellate Division, First Department, reversed, holding that PERB had erred by asserting jurisdiction, and further found that the Library was not a public employer under the Taylor Law. The First Department found as a prerequisite to PERB's jurisdiction that "each of the entities comprising the joint public employer be in its own right a public employer of public employees within the meaning of the [Taylor Law]." *Id.* at 277. The Court of Appeals affirmed the First Department, explicitly holding that non-public employers are not regulated by the Taylor Law. *See also Matter of Queens Borough Pub. Lib. v. Pub. Empl. Relations Bd. of the State of New York*, 64 N.Y.2d 1099 (1985) (finding that the Queens Public Library was not a public employer and, thus, PERB lacked jurisdiction over an improper practice petition filed against it).

We, like PERB, are constrained by *New York Public Library* and, like PERB, find that our jurisdiction under the NYCCBL only exists over public employers. NYCCBL § 12-303(g) defines the term "public employer" as:

> (1) any municipal agency; (2) the board of education, the [City] health and hospitals corporation, the [City] off-track betting corporation, the [City] board of elections and the public administrator and the district attorney of any county within the [City]; (3) any public authority other than a state public authority as defined in subdivision eight of [§] two hundred one of the [CSL], whose activities are conducted in whole or in substantial part within the City; and (4) any public benefit corporation, or any museum, library, zoological garden or similar cultural institution, which is a public employer or government within the meaning of [Taylor Law], employing personnel whose salary is paid in whole or in part from the City treasury.

DCC does not qualify under any of these clauses. DCC is not a municipal agency (NYCCBL § 12-303(g)(1)) or a public authority (NYCCBL § 12-303(g)(3)) or one of the entities enumerated in NYCCBL § 12-303(g)(2). Nor is DCC a public benefit corporation, which are formed by a special act of legislature pursuant to Article 10, § 5, of New York State Constitution. *See Snug Harbor Cultural Center*, 19 PERB ¶ 4044 (1986) (explaining that an institution formed under the not-for-profit corporation law and not an act of the legislature is not a public benefit corporation "regardless of the various indicia of government involvement in and public benefit derived."). Nor is DCC a museum, library, zoological garden or similar cultural institution (NYCCBL § 12-303(g)(4)). Thus, we find that DCC is not a public employer.

As to the Union's contention that the City is also an employer of the employees at issue herein, we note that PERB has consistently held that its jurisdiction only extends to joint employer situations where all of the asserted employers are public. *See State of New York (State Univ. of New York–SUNY at Buffalo)*, 35 PERB ¶ 3019 (2002); *Niagara Frontier Transp. Auth.*, 13 PERB ¶ 3003, at 3004 (1980); *Buffalo United Charter Sch. Educ. Assn.*, 43 PERB ¶ 4009 (ALJ 2010). We believe that this approach is consistent with the holding of the Court of Appeals in *New York Public Library, supra*, and we adopt it in the present case. To do otherwise would require this Board to assert jurisdiction over a non-public employer, something the NYCCBL does not empower us to do.

We have reviewed our cases cited by the Union, *Local 1115, Empl. Union*, 8 OCB 22, and *Legal Serv. Staff Assn.*, 12 OCB 48. Those cases pre-date *New York Public Library*, and while the pivotal question in those cases was also the status of the employer, the analysis we used to answer that question differed from the more circumscribed analysis of the Court of Appeals in *New York Public Library*, which we are now constrained to follow.

Since we find that DCC is not a public employer, and even if the City were a joint employer with DCC, this Board would lack jurisdiction, our inquiry must end, and we do not reach the question of the Union's members employment status *vis-a-vis* the City. As we lack jurisdiction, the Board is constrained to grant the Motion to Dismiss the Petition.

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 Motion filed by the New York City Office of Labor Relations, on behalf of the City of New York and the New York City Administration for Children Services, to dismiss the Petition filed by the Council of School Supervisors and Administrators, docketed as BCB-2927-11, is hereby granted; and it is further

ORDERED, that the Petition filed by the Council of School Supervisors and Administrators, docketed as BCB-2927-11, is hereby dismissed.

Dated: New York, New York
June 29, 2011

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER