Local 1455, DC 37, 4 OCB2d 56 (BCB 2011)

(IP) (Docket No. BCB-2952-11).

Summary of Decision: The Union filed a verified improper practice petition against the City alleging that, by unilaterally seeking to assign the exclusive bargaining unit work of Traffic Device Maintainers and City Parking Meter Service Workers to non-bargaining unit employees through a RFP, the City has violated NYCCBL § 12-306(a)(1) and (4). The City contends that the RFP, issued by the Economic Development Corporation, sought financial advisory services and did not seek to assign any bargaining unit work. The City argues that the EDC is not an entity within the Board's jurisdiction, and that the RFP did not contain any language that could be construed to indicate that it has a plan to contract out the Union's bargaining work. In the event that the Board finds that the City is the proper respondent, the City argues that the matter should be deferred to arbitration, contends that the claims are not ripe, and argues that the Union did not allege facts which would support any violation of the NYCCBL. The Board found that the Union's claims regarding the contracting-out of bargaining unit work were not ripe and dismissed the petition without prejudice to the filing of a new petition in the event steps are taken to implement a contracting-out of bargaining work. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 1455, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On May 2, 2011, Local 1455, District Council 37, AFSCME, AFL-CIO ("Local 1455" or "Union"), filed a verified improper practice petition against the City of New York ("City"). Local 1455 alleged that the City, by unilaterally seeking to assign the exclusive bargaining unit work of Traffic Device Maintainers ("TDMs") and City Parking Meter Service Workers ("PMSWs") to non-bargaining unit employees through a Request for Proposal ("RFP"), has violated New York City Collective Bargaining Law ("NYCCBL") § 12-306(a)(1) and (4). The City contends that the RFP, issued by the Economic Development Corporation ("EDC"), seeks only financial advisory services and does not assign any bargaining unit work. The City argues that the EDC is not an entity within the Board's jurisdiction, and that the RFP does not contain any language that could be construed to indicate that the City or New York City Department of Transportation ("DOT") has a plan to contract out the Union's bargaining work. The City argues that should the Board find that the City is the proper respondent, the matter should be deferred to arbitration; it contends further that the claims are not ripe, and argues that the Union has not alleged facts which would support any violation of the NYCCBL. The Board finds that the Union's claims as to the contracting-out of bargaining unit work are not ripe and dismiss the petition without prejudice to the filing of a new petition in the event steps are taken to implement a contracting-out of bargaining work.

BACKGROUND

Since at least 1986, TDMs and PMSWs have performed the duties necessary for the preparation, installation, maintenance, and repair of parking meters—including muni-

meters—and the maintenance of municipal parking lots. The Union claims that in February 2011, it learned through reports in the media that the City was exploring the possibility of contracting-out the installation and replacement of the City's parking meters. The Union wrote to the DOT's Director of Labor Relations but it did not receive a response. The City claims that the Director of Labor Relations received the letter and contacted the DOT's Traffic Division, which informed him that it had no such plans. The City asserts that the Director of Labor Relations verbally informed Local 1455's President that it had no plans at that time to contract out the work of installing and replacing parking meters.

On February 18, 2011, the EDC issued an RFP for investment banking and financial services firms to provide advisory service to the EDC. The RFP, titled "Public-Private Partnership Financial Advisory Services" reads, in pertinent part:

> [EDC] is seeking proposals from qualified investment banking and financial services firms . . . to provide advisory services to [EDC] in the structuring, financing, underwriting, and execution of public-private partnership ("P3") opportunities with respect to City-owned assets, including assets managed by [EDC]. Pursuant to this [RFP] a contract may be awarded to the firm(s) offering the best combination of innovative ideas and experience, as determined by a selection committee. . . . Any contract that results from this will be a success-based fee contract. The anticipated term of any such contract will be two (2) years, with extensions awarded by the [EDC] at its sole discretion.
>
> The overall goals of the [] RFP (the "Goals") are to:
>
> > -Seek private sector guidance on innovative ways to maximize the value of scarce public assets by enhancing the efficiency and quality of services the City provides to its residents and business customers.
> > -Develop new sources of revenue and/or relief for the City from future operating and capital obligations.
> > -Engage in transactions that utilize the City's strong balance sheet to prioritize long-term value creation over short-term gains.

> -Maximize proceeds to the City from any value creation transaction.
> -Remain sensitive to ways that might incorporate existing work forces and/or increase their productivity.
>
> In particular, [EDC] is interested in Proposals that address the following asset classes:
>
> 1) City parking assets (including on-street meters and off-street lots and garages).
>
> * * *

(Pet., Ex. D, p. 3).

The RFP defined the desired services as "develop and structure an actionable set of P3 innovations that could be implemented within the next two (2) years . . .". (*Id.*, at 4). Further, the RFP stated that, "If requested by the [EDC], the Selected Respondent will, in partnership with the [EDC], manage the negotiation and execution of selected P3 transactions through completion." (*Id.*, at 4).

The Union filed the instant improper practice petition on May 2, 2011. The City claims that the Director of Labor Relations was unaware of the existence of the publication of the RFP by the EDC until after the Union filed the improper practice petition.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the Public Employment Relations Board ("PERB") has consistently held that a unilateral decision to contract out unit work that had historically been performed by unit members constitutes an improper practice. The decision to subcontract unit work is inextricably bound to the other mandatory terms and conditions

of employment. PERB looks at two factors when evaluating claims that a unit's work has been contracted out: 1) whether the subject work was previously performed exclusively by bargaining unit employees; and 2) whether the transferred work is substantially similar to that previously performed by unit members. Here, the work of bargaining unit members in installing and maintaining parking meters and maintaining municipal parking lots has been performed exclusively by bargaining unit members since at least 1986. Further, the bargaining unit work at issue is exactly the work contemplated by the EDC's RFP concerning City parking assets for contracting-out. Thus, by seeking to contract out the work of TDMs and PMSWs, the City has violated NYCCBL § 12-306(a)(1) and (4).[1]

In response to the City's arguments regarding jurisdiction, the Union argues that it has not filed a charge against the EDC but against the City and the DOT. The City has publicly lauded privatization, and is the entity which is seeking to privatize its parking operations. Further, New York State decisional law holds economic corporations to be agents of their associated municipalities.

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[1] NYCCBL § 12-306(a) provides in pertinent part:

> 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 12-305 of this chapter;
> * * *
> (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.

> NYCCBL § 12-305 provides in pertinent part:
> Rights of public employees and certified employee organizations. Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . . A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

The Union argues that it has alleged sufficient facts to demonstrate that the City has undertaken to contract out the assignment of work by contending that the RFP is far from vague or speculative. The City is looking for a public/private partnership to address City parking assets, which unequivocally demonstrates the City's desire to seek out contract work heretofore done exclusively by Union members. The Union does not have to wait until the decision to contract out is made because, for a bargaining obligation to have meaning, a Union must be able to assert it before a decision has been made. Further, the Union argues that deferral is not appropriate here because it has not filed a grievance and the right at issue is one that the Board has made clear is within its jurisdiction and constitutes an improper practice.

Finally, in the instant matter, the City's actions deprive the Union of the ability to try to maintain its members' livelihoods and indicate that the Union's attempts to compromise and cooperate with management will be for naught because it is without the ability to protect the members' jobs. Thus, the City's actions are inherently destructive of employees' rights and the Board should find that the City violated NYCCBL § 12-306(a)(1).

City's Position

The City argues that the petition must be dismissed because the Union has not alleged facts that state a claim against a "public employer" within the meaning of the NYCCBL or against any entity over which the Board has jurisdiction. The EDC is not a municipal agency or public employer under the NYCCBL and, as such, its actions are not subject to the Board's jurisdiction.

Assuming that the Board finds the instant claim is subject to its jurisdiction, the Union has failed to specify any act on the part of the DOT or the City that would give rise to the duty to bargain, a condition precedent to a claimed violation of the duty to bargain in good faith. The RFP does not contain any language which could reasonably be construed to indicate that the City or DOT is contemplating a plan to contract out exclusive bargaining work of the Union. The RFP seeks only research, evaluation, and advice by a firm on the subject of emerging trends, in order to identify and develop options for the City to benefit from financial improvements. A duty to bargain can only arise if the City takes affirmative steps to adopt and implement a proposal, and then only if the proposal can be shown to implicate work exclusively by unit members. The Union has not established either basis to sustain a violation of the NYCCBL.

The City further argues that the claim is not yet ripe, since the Union has not shown that the City has undertaken any action affecting terms and conditions of employment and the Board can only address this issue in the context of an actual controversy, not in the abstract. Since the City has made no statement of its intention to contract out work of bargaining unit members and presently has no intention to do so, the Union's charge is not yet ripe. Assuming that the Board determines that the claim is ripe, the City alternatively argues that the matter should be deferred to arbitration, as Petitioner alleges facts which implicate the provision of the parties' collective bargaining agreement that addresses the contracting-out of bargaining unit work. Finally, the City argues that the Union's allegation that the City violated NYCCBL § 12-306(a)(1) directly or derivatively are unavailing.

DISCUSSION

The Union claims that the DOT is seeking to assign the exclusive bargaining unit work to a private entity. Issues before this Board must be addressed in the context of an actual controversy, and not in the abstract. *DC 37*, 2 OCB2d 31, at 14 (BCB 2009); *Local 1157*, 1 OCB2d, at 15 (BCB 2008); *State of New York (Office of Mental Health)*, 24 PERB ¶ 3004, at 3005 (1991). Here, the record shows that what is contemplated by the RFP in question is the "*seeking [of] proposals*" "*to provide advisory services*" to the EDC "in the structuring, financing, underwriting, and execution of public-private partnership [] opportunities with respect to City-owned assets . . .". (Pet., Ex. D, p. 3) (emphasis added). Thus, any discussion of the contracting-out of bargaining work exists purely in the hypothetical at this point in time.

The Board has held that an improper practice charge can be ripe for review before an employer has affirmatively acted. For example, in *UFA*, 47 OCB 61 (BCB 1991), the New York City Fire Department publicly stated an intention to make certain reassignments of Fire Marshals, but had not yet acted on it. There, the Board held that "there is no question that a controversy exists between the parties on the bargainability of the assignment of Fire Marshals." *Id.*, at 8. However, here, the City has made no such announcement of any plan to contract out work currently performed by Union members. Indeed, no firm has been contracted to provide the advisory services sought, no proposal by that yet-to-be-hired firm has been submitted or reviewed by the City, and no proposal has been selected by the City to implement.

Since we find that the claim is not yet ripe, we need not reach the issue of whether the EDC is within our jurisdiction. Accordingly, we dismiss the petition in its entirety,

without prejudice to the filing of a new petition in the event steps are taken to implement a contracting-out of bargaining work.

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 verified improper practice petition filed by Local 1455, District Council 37 is dismissed in its entirety.

Dated: New York, New York
October 6, 2011

MARLENE GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELAS. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER