DC 37, Local 376, 4 OCB2d 60 (BCB 2011)

(IP) (Docket No. BCB-2887-10).

Summary of Decision: The Union alleged that DOT violated NYCCBL § 12-306(a)(1) and (3) by serving its member with additional disciplinary charges, in retaliation for her protected activity of following her Union's advice to appeal a departmental disciplinary recommendation and refusing to settle a disciplinary matter at OATH. The City filed a pre-hearing motion seeking a ruling on the admissibility of the parties' settlement discussions during a pre-hearing conference before OATH. Because the Union's central retaliation claim concerned statements the City allegedly made during the settlement discussions and exclusion of that evidence might affect resolution of the matter, the Board considered the City's motion. For the reasons discussed below, the Board found that the testimony of the settlement discussions should be admitted. Accordingly, the Board denied the City's motion. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 376, AFSCME, AFL-CIO, on behalf of DONNA SOLLI,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

INTERIM DECISION AND ORDER

On August 17, 2010, District Council 37, Local 376, AFSCME, AFL-CIO, ("Union") on behalf of Donna Solli ("Petitioner"), filed an improper practice petition against the City of New York ("City") and the New York City Department of

Transportation ("DOT"). The Union alleged that DOT violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by retaliating against Petitioner by serving her with additional disciplinary charges after a pre-hearing conference ("Conference") at the New York City Office of Administrative Trials and Hearings ("OATH") at which she followed her Union's advice to decline a settlement offer of the pending charges against her.[1]

On October 7, 2011, the City filed a pre-hearing motion to exclude all evidence concerning the parties' settlement discussions before OATH. Because the Union's central retaliation claim concerns statements the City allegedly made during the settlement discussions and exclusion of that evidence might affect resolution of the matter, the Board considered the City's motion. For the reasons discussed below, we find that the testimony of the settlement discussions is admissible. Accordingly, we deny the City's motion, and order that the matter proceed to hearing.

BACKGROUND

For the purpose of deciding this motion, we accept the factual allegations of the Union's pleadings. *See, e.g. DEA*, 4 OCB2d 35, at 8 (BCB 2010).

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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 . . .
> >
> > * * *
> >
> > (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;

On March 23, 2010, DOT served Petitioner with disciplinary charges alleging that she had, on December 9, 2009, engaged in a physical and verbal altercation with another DOT employee. Petitioner sought the assistance of her Union to defend against the charges. On April 21, 2010, a DOT informal conference was held at which, the Union alleges, DOT offered to settle the charges if Petitioner would accept a 20-day unpaid suspension and forego a disciplinary hearing pursuant to Civil Service Law § 75. Petitioner refused this offer. On May 5, 2010, DOT issued an Informal Conference Decision and Recommended Penalty, which substantiated all of the charnges against Petitioner, and recommended that Petitioner be suspended for 30 days without pay. On May 10, 2010, Petitioner executed a Refusal of Recommended Penalty, thereby invoking her right to a § 75 hearing at OATH.

On August 2, 2010, the Conference was held at OATH at which an OATH Administrative Law Judge ("ALJ"), a DOT representative, a Union attorney, and Petitioner were in attendance. The parties do not contend that mediation pursuant to OATH's procedures was attempted or requested at the Conference.

The Union alleges that at the Conference, DOT renewed the previous offer to settle the charges, and that, after making the offer, the DOT representative stated that "if [Petitioner] did not accept a 20-day suspension, and if she did not authorize [the Union] to waive her right to a Section 75 hearing, DOT would bring her up on additional charges." (Pet., ¶ 8). These potential new charges, the City alleges, were the result of a complaint received by DOT's Office of the Advocate May 24, 2010. The Union further alleges that the DOT representative stated that "DOT intended to add the May 24 charges

only if [Petitioner] refused to authorize [the Union] to waive [her] statutory right to a hearing." (Rep., ¶ 7). The Union, on Petitioner's behalf, rejected the 20-day suspension.

On August 11, 2010, DOT served Petitioner with amended charges stemming from the May 24, 2010 disciplinary complaint. The amended charges allege that, on May 20, 2010, Petitioner failed, refused, and neglected to follow orders regarding completing pothole assignments and punching out at the end of her shift.

On September 20, 2010, a hearing was held at OATH on all of the disciplinary charges. At the hearing, DOT requested that if the charges were sustained, the ALJ recommend the same 30-day suspension that DOT initially recommended at the informal conference. On January 26, 2011, the OATH ALJ's Report and Recommendation was issued. The OATH ALJ found that DOT did not establish the first set of charges concerning the December 9, 2009 altercation, but had established the subsequently added charges. The ALJ recommended a penalty of a suspension of eight days.

The DOT Commissioner adopted the OATH recommendation in September 2011. Petitioner has since served her suspension.

POSITIONS OF THE PARTIES

City's Position

The City requests that the Board exclude evidence concerning the parties' settlement discussions at OATH. In support of its position, the City cites § 1-31 of the OATH Rules, which states in pertinent part:

> (b) All settlement offers, whether or not made at a conference, shall be confidential and shall be inadmissible at trial of any case. Administrative law judges shall not be

> called to testify in any proceeding concerning statements made at a settlement conference.

The City interprets § 1-31 to mean that the settlement discussions should be excluded because "the OATH Rules explicitly declare that such settlement offers are inadmissible in ***any forum,*** which therefore includes an improper practice proceeding with the Office of Collective Bargaining." (Ans., ¶ 42) (emphasis in original). Further, the City contends that if the Board allows evidence of the settlement discussions at OATH, the proffering attorneys could be liable for sanctions at OATH pursuant to § 1-13 of the OATH Rules, entitled "Conduct; Suspension From Practice at OATH." Section 1-13 discusses the possible imposition of sanctions and suspension from practice before OATH for failure to abide by OATH's standards of conduct.

The City argues that the OATH Rules and public policy render the discussions at issue inadmissible because they would have a chilling effect on future settlements, and would discourage the City from making settlement offers in the future. Accordingly, all evidence regarding settlement discussions should be excluded. If this motion is granted, the Union will be unable to prove its claim of retaliation. Therefore, the Board should dismiss the Union's claim.

Union's Position

The Union argues that the Board should deny the City's request to exclude the evidence in question. The Union notes that OATH rules are not binding on the Board of Collective Bargaining. Further, OATH Rules do not exclude evidence of settlement discussions; only "settlement offers" are excluded. The Union does not intend to present evidence of a settlement offer, but instead testimony that DOT made a threat to retaliate by proffering additional disciplinary charges if no settlement were reached. Moreover,

the OATH Rules should be understood to implicitly exclude from confidentiality certain offensive or illegal behavior.

The Union agrees that an employer should be able to negotiate settlements of disciplinary charges, and that reduction in penalties in exchange for an employee's waiving her rights to contest the charges is not improper. However, such negotiations should not be coercive or threatening. Specifically, in this instance, the policy favoring settlement does not permit an employer to threaten to bring unrelated charges if an employee decides to pursue her right to a hearing on the pending charges, and that evidence of such threatening and coercive behavior should be admissible.

DISCUSSION

The sole question before us at this juncture is whether evidence of the DOT representative's alleged threat to retaliate against an employee for the exercise of her protected activity is rendered inadmissible because the alleged threat was made in a pre-hearing conference after the City had made a settlement offer. We have considered the City's argument, and are not persuaded that this evidence should be excluded.

The OATH Rules to which the City cites are entitled "Rules of Practice Applicable to Cases at OATH Generally, Other Than Environmental Control Board Cases." By their own terms, the OATH Rules are only applicable to proceedings before OATH, and, in any event, the OATH Rules would not preclude testimony regarding the alleged threat to retaliate against Petitioner for exercising her right to a hearing on the disciplinary charges against her.

Section 1-31(b) of the OATH Rules provides that "[a]ll settlement offers, whether or not made at a conference, shall be confidential and shall be inadmissible at trial of any case." The City urges that this provision should be read to exclude all evidence regarding settlement discussions in any forum. However, this reading of the OATH Rules is overbroad in two distinct ways.

First, there is nothing in this language to indicate that this provision purports to apply to any forum other than OATH. Indeed, the term "case" is specifically defined by § 1-01 of the OATH Rules to "mean an adjudication pursuant to C[ity] A[dministrative] P[rocedure] A[ct], § 1046, referred to OATH pursuant to Charter, § 1048."[2] Thus, by its own terms, § 1-31 cannot apply to proceedings entrusted by other law, such as the NYCCBL, to different forums, including this Board.

Moreover, the City erroneously assumes that the OATH Rule would, where applied, have the effect of barring any and all evidence regarding conduct of settlement negotiations. However, § 1-31of the OATH Rules is not so broadly written; it limits the exclusion to "settlement offers." By contrast, OATH's mediation process, which was not invoked by the parties in the proceedings before OATH, provides that "[t]he parties, their representatives and the mediator, are all obligated to keep the contents of a mediation, written or verbal, strictly confidential in accordance with the terms of the Agreement to Mediate, which the parties will sign prior to the mediation." (CITY OF NEW YORK CENTER FOR MEDIATION SERVICES: MEDIATION GUIDELINES at 1).

[2] Section 1046 of the City Administrative Procedure Act (NYC Charter, ch. 45) provides minimum procedural requirements for agencies "authorized to conduct an adjudication." Section 1048 of the New York City Charter provides that OATH "shall conduct adjudicatory hearings for all agencies of the city unless otherwise provided for by executive order, rule, law, or pursuant to collective bargaining agreements."

Here, the Union does not wish to elicit evidence of a settlement offer, which was made initially at the April 21, 2010 DOT informal conference, and again at the OATH Conference. The Union's sole concern is to provide testimony regarding the alleged threat DOT made at the OATH Conference, which does not turn upon the specifics of the offer.

The City also argues that public policy supports the exclusion of the parties' settlement discussions, asserting that allowing this evidence would have a "chilling effect" on future settlement discussions. This Board supports OATH's efforts to encourage the amicable resolution of disputes through settlement, and, like OATH endeavors to promote such resolutions. However, "public policy" must have a source in statute or judicial case law. *See Matter of New York City Health and Hospitals Corp. v. Board of Certification of City of New York*, 2007 NY Slip Op. 30921 (U) (Sup. Ct. N.Y. Co. Apr.23, 2007) (Tolub, J.) *Matter of New England Mutual Life Ins. Co. v. Caruso*, 73 N.Y.2d 74, 81 (1989). The City has failed to identify an applicable public policy supporting its contention that retaliation, which would otherwise appropriately form the basis of an improper practice claim, should be immunized because it was threatened at a pre-hearing conference at which settlement was discussed. While public policy promotes settlement, it also allows for evidence to be adduced in order to support a claim that illegitimate means have been used in an attempt to obtain a settlement. *Okorie-Ama*, 70 OCB 5, at 15 (BCB 2007) (citing cases). Accordingly, the mere fact that settlement was being discussed does not shield a party from an improper practice claim for conduct that may violate the NYCCBL. *Id.* at 15-17*; see also Feder*, 4 OCB2d 46, at 41 (BCB 2011).

The question raised by the Union here is whether statements made in the context of the Conference were retaliatory in violation of NYCCBL 12-306(a)(1) and (3). Evidence concerning those statements is necessary to establish this alleged violation. For the reasons stated above, we find no basis to exclude from evidence the alleged threats of retaliation or the context in which these statements were made.

Finally, we note that this Board is confident that our Trial Examiners in the course of hearings will exercise their discretion to protect to the extent possible the disclosure of settlement offers.

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 City of New York's motion for the exclusion of evidence is denied; and

ORDERED, that the improper practice petition, docketed as BCB-2887-10, filed by District Council 37, Local 376, AFSCME, AFL-CIO and Donna Solli against the City of New York and the New York City Department of Transportation proceed to hearing.

Dated: November 16, 2011
New York, New York

MARLENE GOLD
CHAIR

CAROL WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELAS. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER