L.1757, DC37, et. al v. City, et. al, 41 OCB 48 (BCB 1988) [Decision No. B-48-88 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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LAMAR McNABB and ASSESSORS, APPRAISERS and MORTGAGE ANALYSTS, LOCAL 1757, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

DECISION NO. B-48-88

Petitioners,

-and-

DOCKET NO. BCB-931-86

THE CITY OF NEW YORK, JUDITH A. LEVITT, as PERSONNEL DIRECTOR OF THE CITY OF NEW YORK, and PAUL A. CROTTY, COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION and DEVELOPMENT,

Respondents.

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INTERIM DETERMINATION AND ORDER

On December 23, 1986, Lamar McNabb and Local 1757, District Council 37, AFSCME, AFL-CIO (hereinafter "petitioners" or "the Union") filed an improper practice petition alleging that the City of New York, its Director of Personnel and the Commissioner of the Department of Housing Preservation and Development (collectively referred to as "respondents" or "the City") violated Sections 12-306 a(l) and (3) (former Sections 1173-4.2a(l) and (3) of the New York City Collective Bargaining Law ("NYCCBL") by failing to promote McNabb and other members of petitioner

local.[1] The City filed its answer to the petition on February 19, 1987. On March 20, 1987, petitioners submitted a reply. Thereafter, petitioner sought and was granted leave to submit a memorandum of law, which was filed on July 13, 1987. Respondent submitted a reply memorandum on October 14, 1987.

## Background

On or about June 25, 1985, Howard Habler, as President of Local 1757 of District Council 37, and four named individuals "on behalf of themselves and all others similarly situated,"[2] initiated an Article 78 proceeding

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[1] Section 12-306a of the NYCCBL provides, in relevant part:

> a. Improper public employer practices. 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;.....

[2] The petitioners were all permanently appointed to the title of Mortgage Analyst and would be eligible for promotion to the title of Associate Mortgage Analyst upon successfully completing an examination.

seeking to invalidate the City's continuing use of provisional employees in the Associate Mortgage Analyst title for periods in excess of nine months, to compel the City to conduct a civil service examination for the Associate Mortgage Analyst title by a date certain and, thereafter, to establish a list from which candidates would be hired to replace all provisional appointees. On January 6, 1986, New York Supreme Court Justice William P. McCooe issued a decision directing the City to conduct a competitive examination for the title of Associate Mortgage Analyst no later than May 15, 1986 and to make appointments from the list of eligibles promulgated pursuant to said examination.[3]

On or about May 15, 1986, an examination was duly held. In June 1986, a list of eligibles consisting of eight names was established. Among the successful examinees were Lamar McNabb and Steve Kaufer, both of whom were named petitioners in the Article 78 proceeding and officers of the chapter of Local 1757 that serves persons in the Mortgage Analyst title series. On or about August 20, 1986, McNabb, Kaufer and four other candidates were inter-

[3] Matter of Habler v. City of New York, Index No. 15545/85, Sup. Ct., N.Y., Spec. Term, Pt. 1 (10/25/85)

viewed for positions in the Associate Mortgage Analyst title.[4] While the other four candidates were appointed, neither McNabb (ranked number 7 on the list) nor Kaufer (ranked number 2) was offered a position.

## Positions of the Parties

### Petitioners' Position

Petitioners contend that McNabb and Kaufer who, it is alleged, were better qualified for promotion to Associate Mortgage Analyst positions than the individuals who were appointed, were denied promotions because of their protected union activity, which allegedly "included but was not limited to" serving as chapter officers of Local 1757 and participating in the aforementioned Article 78 proceeding. Petitioners argue that the failure to promote McNabb "and other members of Local 1757"[5] was intended to interfere with, restrain or coerce public employees in the exercise of rights protected by the NYCCBL and to discriminate

[4] Two of the candidates included on the list of eligibles did not appear for interviews.

[5] From the facts alleged by petitioners, it does not appear that any members of Local 1757 other than McNabb and Kaufer were on the eligible list and made themselves available for and were denied appointments to Associate Mortgage Analyst positions. Accordingly, we shall limit our consideration of the petition to the allegations concerning McNabb and Kaufer.

against members of Local 1757 so as to discourage their participation in the Union. Petitioners deny that the City was merely exercising its discretion under the Civil Service Law or its management prerogatives under the NYCCBL when it denied promotions to McNabb and Kaufer.

In its memorandum of law, the Union argues that the participation of these individuals in Matter of Habler v. City of New York is protected activity under Section 12-305 (former Section 1173-4.1) of the NYCCBL.[6] In support of this position, petitioners point out that the legal proceeding was brought by the Union on behalf of its members, that the Union bore all expenses relating to the litigation and that the purpose of the proceeding was to increase promotional opportunities and job security for its members. Petitioners argue that, at least by implication, both the Board of Collective Bargaining

[6] Section 12-305 of the NYCCBL provides, in relevant 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.

("Board") and the State Public Employment Relations Board ("PERB") have held that employee participation in a lawsuit brought by their union is protected activity.[7] Moreover, they argue, while it is well-settled that unions have standing to sue to protect and promote the interests of their members,[8] it is sometimes necessary that individual union members be named as plaintiffs in order to establish standing to sue. Petitioners reason that

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[7] The Union cites Schoenbrun v. District Council 37, AFSCME, AFL-CIO and City of New York, Board Decision No. B-8-84, where the Board held an improper practice petition in abeyance pending a final determination in related federal court litigation involving a claim that the City had retaliated against petitioners for using the courts to enforce rights deriving from Section 220 of the State Labor Law. In its answer to the improper practice petition, the City had asserted that the filing of a court action was not protected activity under the NYCCBL. The Board did not reach that issue, as the underlying dispute was resolved by the court. See, McCoy v. Goldin, 598 F. Supp. 310 (EDNY 1984). In Matter of Oyster Bay - East Norwich Central School District, 18 PERB ¶3075 (1985), PERB affirmed the conclusion of an administrative law judge that the union had failed to establish that the abolition of a position was a response to the union's lawsuit challenging the reduction in the work year of the employee whose position subsequently was eliminated. Petitioner here argues that it may be inferred from the actions of the Board in the former case and of PERB in the latter that participation in a lawsuit constitutes protected activity under the City and State collective bargaining laws.

[8] As an appendix to its legal memorandum, the Union has submitted copies of a number of decisions resulting from actions initiated by District Council 37 and its locals on behalf of their members.

the ability of the union to protect the interests of its members would be hampered if the participation of individual members in such actions was not deemed protected activity under the collective bargaining law.

Finally, petitioners note that participation in a civil suit against the employer is protected activity under the National Labor Relations Act ("NLRA").[9] the union asserts that the body of law established in the private sector is relevant, although it recognizes that decisions issued under the NLRA are not binding in the public sector. It also argues that since many of the rights of public employees derive from statutes, such as civil service laws, which can only be enforced through legal proceedings, the need for unions to resort to litigation to enforce the rights of their members is greater in the public sector than in the private sector. Petitioners therefore conclude that participation in a lawsuit, if protected under the NLRA, certainly must be protected under the NYCCBL.

[9] The Union cites Quarles Building Maintenance Company, 105 LRRM 1695 (Advice Memo 1980); Leviton Manufacturing Co. 203 NLRB No.38, 83 LRRM 1265 (1973); and Trinity Trucking & Manufacturing Corp., 227 NLRB No.121, 94 LRRM 1223 (1977).

Respondents' Position

Respondents contend that the instant petition should be dismissed because no "case or controversy" has been presented to the Board. Respondents assert that since each of the four persons appointed to an Associate Mortgage Analyst position from the list of eligibles on which petitioner McNabb appeared was ranked higher on the list than McNabb, it is clear that McNabb was not 'passed over' in the promotion process.[10] The City notes that inclusion on an eligibility list does not, in any event, create a vested right to promotion. The employer enjoys a great deal of discretion in making appointments from a civil service list, respondents assert, and may consider factors in addition to an applicant's position on that list, including, as in the present case, the past performance of the applicant.[11]

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[10] Notwithstanding the City's limitation of its position to petitioner McNabb,, as noted supra at note 5, we deem the petition to include both McNabb and Kaufer.

[11] The City also notes that Section 61 of the Civil Service Law provides that appointments or promotions "shall be made by the selection of one of the three persons standing highest on [the] eligible list...."

Respondents also contend that the City's failure to promote McNabb was within its management rights under Section 12-307b of the NYCCBL, specifically, its right to "determine the standards of selection for employment" and to "determine the methods, means and personnel by which government operations are to be conducted..." (emphasis added).

The City asserts further that petitioners have failed to allege facts which would establish improper motivation in the failure to promote McNabb. According to the City, petitioners rely solely upon "conjecture" in asserting that McNabb's participation in a lawsuit was the basis for the decision not to promote him. It notes that the Board requires that "allegations of improper motivation must be based upon statements of probative facts, rather than upon recitals of conjecture, speculation and surmise."[12]

In its reply memorandum, the City argues that participation in a lawsuit seeking to compel the administration of a civil service examination does not constitute protected activity within the meaning of the NYCCBL. Respondents

[12] Decision No. B-2-87.

assert that the decisions cited by petitioners have no bearing on this issue. According to respondents, neither PERB nor this Board has addressed the issue whether the filing of a lawsuit is protected activity. Moreover, the City notes, the decisions of the National Labor Relations Board ("NLRB") are not binding on the Board. Even if the NLRB did set precedent for this Board, it is argued, the cases cited by petitioners are not relevant because they involve the exercise of rights that are expressly granted by the NLRA. Respondents note that the lawsuit in the instant matter merely sought to enforce rights derived from the Civil Service Law. They contend:

> the institution of a lawsuit seeking to enforce a right which does not arise under the NYCCBL cannot possibly be deemed to be protected activity under that law.

Furthermore, comparing Section 7 of the NLRA and Section 12-305 of the NYCCBL, respondents assert that the former "is much more expansive."[13] Specifically, the City

[13] To support this statement, the City cites Dutchess Community College v. Rosen, 17 PERB ¶3093 (1984). PERB's decision in that case has been upheld by the Court of Appeals. Rosen v. Public Employment Relations Board, 72 N.Y. 2d 42, 530 N.Y.S 2d 534 (1988).

notes that NLRA Section 7 grants employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," while the NYCCBL does not contain this language. Based upon the foregoing, the City requests that the Board issue a ruling finding that the filing of the lawsuit in the instant matter was not protected activity under the NYCCBL.

## Discussion

Petitioners assert that Local 1757 members McNabb and Kaufer were denied promotions because of their protected union activity," allegedly consisting of, inter alia, serving as chapter officers of the local and being petitioners in the legal proceeding brought by the Union to force the City to administer an examination for the title of Associate Mortgage Analyst. The City generally denies the allegations of the petition and, by way of affirmative defense, asserts, inter alia, that petitioners have failed to present a "case or controversy" over which the Board would have jurisdiction. The City argues that, since each of the four persons appointed to Associate Mortgage Analyst positions was ranked higher on the eligible list than McNabb, it is clear that McNabb was not 'passed

over' in the selection process and that the failure to promote McNabb therefore cannot be a violation of the NYCCBL.

Applying the "one-in-three" rule prescribed by Section 61 of the Civil Service Law to the facts of this case as they are alleged by the Union, it appears to us that McNabb, ranked number 7 on a list of eligibles, of whom two-one ranked higher than McNabb and one ranked lower - failed to appear for interviews, ought to have been considered for one of the four Associate Mortgage Analyst positions which were filled by the City.[14] If he either was not considered, or was considered and rejected, for reasons that violate the NYCCBL, an improper practice may be found to have been committed. Similarly, with respect to Kaufer who, it is alleged, was considered for three positions and dropped from the list, if it is demonstrated that the basis for such rejection is a prohibited one under the NYCCBL, an improper practice may be found. While respondents, by their general denial, have raised

[14] Since one of the individuals who ranked higher on the eligible list than McNabb was not considered (because he was not interviewed), McNabb effectively moved into sixth position on the list and, therefore, was among the three candidates who should have been considered for the fourth position to be filled.

an issue of fact with respect to petitioner McNabb's eligibility to be considered for promotion, the resolution of which is a necessary precedent to our consideration of the Union's allegations of improper motivation, the mere denial of petitioners' version of the facts is not sufficient to negate the allegations of the petition.[15] Accordingly, we shall direct that a hearing be held before n Trial Examiner in order to establish a factual record from which we may determine whether the denial of promotions to Local 1757 chapter chairperson McNabb and to chapter treasurer Kaufer violated the NYCCBL.

We note, however, that the petition raises an issue of first impression for this Board concerning the scope of public employee rights under Section 12-305 of the NYCCBL, specifically, whether the initiation of a legal. proceeding may constitute protected activity under that

[15]Additionally, we do not consider the judicially recognized 'case or controversy' doctrine in any way applicable to the processes of this Board. To the contrary, we are expressly authorized by statute to render advisory opinions in appropriate dases, regardless of whether a case or controversy has been shown to exist. See NYCCBL §12-309a(l).

section of the law.[16] In order to guide the parties in preparing for hearing in this case, we shall rule on this legal question which the parties specifically have addressed in their memoranda of law.

At the outset, we emphasize that the issue presented here is not whether the initiation of a lawsuit by an individual or a group of employees apart from, or in the absence of, a union is protected under the statute. The Court of Appeals recently has made clear that "concerted activity", as that concept has been defined in the private sector case law, is not protected under Section 202 of the Taylor Law, the state analogue to Section 12-305 of our statute.[17] Rather, the question here is whether

[16] As indicated supra at note 7, we were presented with a facially similar charge, but did not need to decide the issue, in Schoenbrun v. District Council 37, Decision No. B-8-84.

[17] In Rosen v. Public Employment Relations Board, 72 N.Y. 2d 42, 530 N.Y.S. 2d 534 (1988), the Court of Appeals agreed with PERB that Taylor Law §202 does not afford protection to concerted activities of employees which fall short of attempts to form, join or participate in, or refrain from forming, joining or participating in an employee organization. The court held that PERB had correctly determined that Dutchess Community College did not commit an improper practice within the meaning of Taylor Law §209-a.1 when it reduced a French professor's teaching schedule at least in part because she voiced

(more)

the participation of McNabb and Kaufer in a lawsuit initiated by the Union, on their behalf and on behalf of others similarly situated, is encompassed within the rights granted public employees in NYCCBL Section 12-305, and protected

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(Footnote 17 continued)

the complaints of an unrepresented group of faculty members about the terms and conditions of their employment. The court stated, in part:

> Conspicuously absent from the formulation of a public employee's right to organize in §202 is the additional right guaranteed in the NLRA "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." We conclude from the otherwise parallel terminology in each provision that the Legislature, by omitting from §202 of the Taylor Law the additional reference to "concerted activity" intended to afford a public employee only the right to form, join or participate in an employee organi-zation. Because the Legislature has by its definition restricted the reach of §202, it must not have intended for §202 to protect precisely the same broad range of employee activity as is protected under §7 of the NLRA (citation omitted)....

Taking its analysis a step further, the court noted:

> Not only is the scope of the protected right to organize drawn more restrictively in §202 of the Taylor Law than in §7 of the NLRA, but a comparison of the corresponding

by Section 12-306a(l), and, similarly, whether such conduct constitutes "participation in the activities of" a public employee organization as contemplated by Section 12-306a(3).

Since the applicable provisions of the NYCCBL are nearly identical to the corresponding provisions of the State law, we have consulted decisions of PERB in which the essential criteria for finding an activity to be "protected" under section 202 have been developed. In Matter of Board of Education of Deer Park Union Free School District, a PERB hearing officer held that teacher participation in a union - administered "success card" program was not protected activity because it did not affect the employer employee relationship. The opinion noted that:

> [a]lthough the concept of protected activity should not be limited to activities immediately and directly related to the employment relationship,

(Footnote 17 continued)

> definitions of the term employee organization reveals that the Taylor Law was not intended to protect unorganized-though concerted-activity.

530 N.Y.S. 2d at 538-39

> it must, at least be indirectly related to that relations.[18]

PERB affirmed the decision of its hearing officer.[19] Thus, in order to be protected under the Taylor Law, the activity in question must be "related to the employment relationship."

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[18] 10 PERB ¶4594 (1977) at p.4689. Under the "success card" program, classroom teachers prepared cards concerning student achievement and, at union expense, mailed them to the students' parents. The purpose of the program was, at least in part, to promote the union's public image and to improve its relationship with the community.

[19] 11 PERB ¶3042 (1978). In affirming, PERB stated that the hearing officer found "that the success card program was not a protected activity under the Taylor Law because it was not related to the terms and conditions of employment of the teachers" (emphasis added). 11 PERB at p.3065. As the hearing officer had expressly rejected the employer's contention that the scope of protected activity should be limited to mandatory subjects of negotiations, a conclusion which PERB evidently accepted, it does not appear that PERB intended to narrow the definition of "protected activity" when it referred to "terms and conditions of employment." See, Matter of Town of Hempstead, 18 PERB ¶4642 (H.O. 1985), aff'd, 19 PERB ¶3022 (1986)("employee cannot be threatened or discriminated against in his or her employment due to the bargaining agent's discussion of a nonmandatory working condition with the employer at the employee's request"). See also, Matter of City School District of the City of Corning, 15 PERB ¶4634 (H.O. 1982), aff'd, 16 PERB ¶3023 (PERB 1983)(disclosure by school district of union internal report did not interfere with teachers' protected rights where report had neither direct nor indirect bearing on terms and conditions of employment and was essentially political in nature).

Additionally, PERB has indicated that activity is protected under Taylor Law Section 202 only if it is engaged in on behalf of an employee organization and is not strictly personal. In Matter of City of Saratoga Springs, PERB held that where an acting fire lieutenant, who was also a union officer and negotiator, closed down a fire station in response to a reduction in the minimum staffing standard, and contacted the news media to explain that he had taken such action due to unsafe working conditions, he was not protected by the Taylor Law. PERB found that these actions were taken in his capacity as Acting Lieutenant and not as a spokesman for the Union. It concluded that the initiation of disciplinary proceedings, motivated by unprotected activities, was not an improper practice.[20]

Applying the above-described twofold test of protected activity to the facts alleged in the matter before us,

[20] 18 PERB ¶3009 (1985). Cf. Matter of New York City Transit Authority, 18 PERB ¶4644 (ALJ 1985), aff'd, 19 PERB ¶3021 (PERB 1986)(where disciplinary charges were prompted by fact that employee, acting in his capacity as union representative investigating possible unsafe conditions at worksite of unit employees, complained to employer regarding fire safety conditions, per se Taylor Law violation was found).

we note, first, petitioners' assertion that the purpose of the activity at issue here (the legal proceeding entitled Matter of Habler v. City of New York) was to increase promotional opportunities and job security for members of Local 1757. We find that this action, which sought to compel the City, in compliance with Civil Service Law, to remove employees serving provisionally in excess of nine months, to schedule a civil service examination on the basis of which members of the bargaining unit would be eligible to compete for promotions, and to fill the vacated positions with permanent competitive appointees, is sufficiently related to the employment relationship between the City and bargaining unit employees to satisfy the first element of the test. We reject respondents' argument that a lawsuit must involve the enforcement of rights arising under the NYCCBL in order to be protected activity under our law. Contrary to the City's assertion, it does not appear that the private sector cases referred to by the Union require that the protected activity lawsuit involve rights granted by the NLRA.[21] PERB appears

[21] For example, in Trinity Trucking & Materials Corp., supra note 9, the lawsuit was based on an alleged breach of contract for failing to adhere to the contract scale for wages and truck rentals. It also included claims for compensatory and punitive damages.

to share our view for, in Oyster Bay - East Norwich Central School District, it impliedly held that the filing of a civil action alleging that the reduction of the work year of three administrators was a breach of contract was protected activity under the Taylor Law.[22] We therefore conclude that the first criterion for a finding of protected activity has been met here.

Next, we note that the lawsuit at issue was filed in the names of the president of Local 1757 and interested unit members "on behalf of themselves and all others similarly situated," that District Council 37's attorneys represented all of the petitioners in the action and that the Council bore all of the expenses of the litigation. Additionally, it appears that McNabb and Kaufer were chapter officers of Local 1757 at the time of the proceeding. From these alleged facts we conclude that, notwithstanding the fact that McNabb and Kaufer clearly had a personal interest in the outcome of the litigation, the proceeding itself

[22] 18 PERB ¶3075, aff'g 18 PERB ¶4594 (1985). PERB affirmed the conclusion of its administrative law judge that the improper practice charge should be dismissed because the record did not support the union's claim of animus based on the lawsuit which was filed years earlier.

was a union-initiated action and the participation therein of union members was participation in the activities of an employee organization, which is protected under the NYCCBL.[23]

We agree with respondents that the rights granted to private sector employees under Section 7 of the NLRA, which include a right to engage in "concerted activities for the purposes of collective bargaining or other mutual aid or protection," are broader than the rights granted employees under Section 12-305 of the NYCCBL. That the State Legislature intended such a distinction is clear.[24] However, in the instant matter, we need not take this important difference into account because, as stated above, we find that the participation of McNabb and Kaufer in a lawsuit brought by their certified bargaining representative was union activity under the NYCCBL.

As we have concluded that the twofold test of protected activity under the Taylor Law has been satisfied here, the burden is now upon petitioners to establish

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[23] NYCCBL §12-306a(1) and (3).

[24] See note 17 supra.

that the denial of promotions to McNabb and Kaufer was motivated by employer animus related to their participation in the Union lawsuit, by their activities as chapter officers of Local 1757, or by other union activity.

O 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

DETERMINED, that the participation of Lamar McNabb and Steve Kaufer in the legal proceeding initiated by Local 1757, District Council 37, AFSCME, AFL-CIO was protected activity within the meaning of Section 12-305 of the New York City Collective Bargaining Law; and it is hereby

ORDERED, that a bearing be held before a Trial Examiner designated by the Office of Collective Bargaining for

the purpose of establishing a record upon which this Board may determine whether there has been a violation of the Collective Bargaining Law as alleged by petitioners herein.

DATED: New York, N.Y.
September 20, 1988

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