UPOA v. City, 43 OCB 24 (BCB 1989) [Decision No. B-24-89 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

DECISION NO. B-24-89

UNITED PROBATION OFFICERS
ASSOCIATION,

DOCKET NO. BCB-1052-88

Petitioner,

-and-

CITY OF NEW YORK,

Respondent.
---------- X

DECISION AND ORDER

On April 22, 1988, the United Probation Officers Association ("the Union" or "the UPOA") filed an improper practice petition against the City of New York ("the City") alleging that the New York City Department of Probation ("the Department") violated Section 12-306a[1] of the New York City Collective Bargaining Law ("NYCCBL") by holding "Ad Hoc Security meetings with UPOA

[1]Section 12-306a of the NYCCBL states as follows:

> 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;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;
>
> (3) to discriminate against any employees for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
>
> (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.

represented employees and denying the Union the right to be present." On May 9, 1988, the City filed a verified answer. The Union filed a reply on May 31, 1988.

BACKGROUND

The New York City Department of Probation operates an Intensive Supervision Program ("the ISP" or "the Program"), which is designed to provide supervision to probationers who are considered "high-risks of failure" or who were originally sentenced to jail terms, but were then placed on probation. The State of New York, which funds the ISP in its entirety, mandates that probationers participating in the Program be visited at least once a month. Frequently, Probation Officers assigned to the ISP are required to go into the high crime neighborhoods of New York City to visit probationers in the Program. Therefore, in March 1988, members of the UPOA assigned to the ISP submitted complaints to the Commissioner of the Department over what they referred to as the "unsafe working conditions regarding mandatory field visits in the ISP."

On or about April 11, 1988, the Commissioner met with John Martorana, Executive Director of the ISP, and ISP Branch Chiefs Louis Kraus and Henry Eisig. The City asserts that at that meeting it was suggested that Mr. Kraus and Mr. Eisig "should elicit the concerns of the Probation officers about safety in the [P]rogram. The elicited information was then to be sent back to the Commissioner for consideration as to a possible formulation of a new policy."

Subsequent to his meeting with the Commissioner, ISP Branch Chief Kraus sent a memorandum to certain members of the UPOA bargaining unit notifying them that a meeting would be held on Monday, April 18, 1988 at the Department's 125th Street office "to discuss safety in the field regarding the ISP ....” Although not notified personally, Andrea Johnson, a member of the UPOA Executive Board, learned about the meeting soon after it was scheduled and telephoned Ann Rozakis, Director of Labor Relations for the Department. Ms. Johnson left a message for Ms. Rozakis advising her that she "was going to the meeting because a mandatory subject of collective bargaining was being discussed, the UPOA was not notified that such a meeting would be held and the UPOA was not being given any opportunity to bargain regarding same."

At the meeting on April 18, 1988, Mr. Kraus, allegedly acting on the advice of Ms. Rozakis, refused to permit Ms. Johnson to participate in the meeting. The UPOA asserts that ISP Branch Chief Kraus "directed . . . [Ms.] Johnson to leave the meeting without discussing or negotiating the mandatory subject of safety in the field for ISP employees in the Department despite [Ms.] Johnson's request that she be allowed to remain at the meeting in behalf of the UPOA and its bargaining unit members."

Thereafter, on April 22, 1988, the UPOA filed the instant improper practice petition, claiming violations of Section 12-306a of the NYCCBL. As a remedy, the Union requests that the City be directed to:

(1) cease and desist from refusing to bargain

> with the UPOA and its representatives regarding safety in the field for ISP employees represented by the UPOA;
>
> 2) cease and desist from bypassing the UPOA, The designated and certified representative of the ISP employees in holding "Ad Hoc Security Meetings" with UPOA represented employees and denying the Union the right to be present;
>
> (3) bargain with UPOA with respect to the working conditions and safety requirements of UPOA represented employees engaged in ISP field visits.

POSITION OF THE PARTIES

Respondent's Position

The City asserts that the improper practice petition should be dismissed because the UPOA has not alleged any action by the Department which is even arguably violative of the NYCCBL. The City claims that pursuant to Section 12-307b of the NYCCBL,[2] the Department clearly has the right to obtain information about its

[2]Section 12-307b of the NYCCBL states, in relevant part, as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.... (Emphasis added)

operations without meeting or negotiating with the Union. In support of its position, the City notes that in Decision No. B-2-86, the Board upheld the City's right to seek information from its employees, under threat of disciplinary action, through the use of a written survey. In the instant case, the City argues, information sought by the Department was requested in a staff meeting, and without any threat that disciplinary action would be taken if the Probation Officers did not comply with the Department's request for information.

The City contends that the staff meeting on April 18, 1988 "was an attempt by the [Department] to gather information as to concerns of the ISP officers so that the [Department] could ascertain, what, if any, changes in policy might be necessary to address the question of safety in field visits." The City argues that contrary to the UPOA's assertion, the staff meeting was not called to discuss, let alone actually implement, changes in working conditions. Rather, the purpose of the meeting was "simply to gather the opinions of those who work in the program." Since no policy or collective bargaining issues were raised at the meeting, the city maintains that "[a]ny attempt by the Union to seek negotiations at such a meeting would clearly be premature."

Finally, the City contends that to determine that the Department was obliged to allow Ms. Johnson, a union official, to attend the meeting in question "would lead to the situation that any staff meeting between the City and any employee represented by the UPOA would require the presence of the union

representative and lead to the possibility of required negotiations whenever any information with regard to any program is sought." Inasmuch as such a result is not contemplated in the NYCCBL, or in any of the Board's decisions relating to the improper practice provisions thereof, the City contends that the Union has failed to state an improper practice claim under the NYCCBL.

Petitioner's Position

The UPOA argues that even if the City does have the right to gather information from its employees, " ... it does not have the right to bypass the union." In its reply, the Union maintains that contrary to the City's assertion, Decision No. B-2-86 does not support the dismissal of its improper practice petition. The UPOA submits that Decision No. B-2-86 is distinguishable from the instant matter in that it involved the circulation of a written survey by the City to its employees; not the scheduling of a meeting by the City with a particular group of employees to discuss their working conditions. Moreover, the Union claims that Decision No. B-2-86 did not involve any attempt by the City to circumvent union input; whereas in the instant matter, the Department barred a union representative from attending the meeting.

The Union further contends that the City "draws a doubtful distinction between discussing changes in working conditions and gathering opinions/information about working conditions." It submits, however, that even if the City is correct in its

assertion that in the latter circumstance it may bar the attendance of a union representative, the memorandum which announced the meeting indicated that employees' recommendations would be discussed. "Plainly", the UPOA claims, "changes in working conditions were a focus of the meeting." Accordingly, the Department was required to negotiate with the Union.

Finally, the UPOA asserts that the City's conduct interfered with its effectiveness as a bargaining representative and, therefore, violated Section 12-306a of the NYCCBL. In support of its assertion, the Union notes that in City of Elmira, 16 PERB ¶4508 (1883), the Hearing Officer determined that the City of Elmira violated Section 209a.1(a)[3] of the Taylor Law, by agreeing

[3]The Taylor Law, Section 209a.1 defines an improper employer practice as follows:

> It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees; or (e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article.

to meet with a unit employee concerning the safety implications of his work assignment only if no union representatives were present. The Hearing Officer stated that "By such insistence, an employer gives employees less reason to rely on their negotiating agent. This detracts from the status of that representative and necessarily interferes with its right of representation under the Act."

Thus, for all of the above-stated reasons, the UPOA urges the Board to grant its improper practice petition, and to award the relief requested therein.

DISCUSSION

The Union does not dispute the City's assertion that in Decision No. B-2-86 we held that it is within the City's statutory management right to obtain information directly from its employees. Instead, the UPOA contends that Decision No. B-2-86 is distinguishable from the instant case in that it did not involve any attempt by the City to circumvent union input. Moreover, the Union claims that the City "draws a doubtful distinction" between discussing changes in working conditions and gathering opinions/information about working conditions. It argues that contrary to the City's assertion, the participation of the union is necessary in either situation and, therefore, the Department violated the NYCCBL when it barred Ms. Johnson from attending the April 18, 1988 meeting. Even if the City were correct in drawing that distinction, however, the Union contends that the Department still would have been required to negotiate

with the UPOA because the April 18, 1988 meeting focused on changes in working conditions.

In Decision No. B-2-86, petitioner, a corrections officer, claimed that the Department of Corrections committed an improper practice by ordering employees to participate in a survey conducted by the National Institute of Corrections, and by threatening discipline if they did not comply. We stated that in the absence of specific facts which show that the action of a City official was based upon motives prohibited by Section 12-306a of the NYCCBLBL; that such conduct interfered with or otherwise violated the rights to organize and to bargain collectively (or to refrain from doing so) granted by Section 12-305; or that such conduct discriminated against petitioner or any other employee, it is within the City's statutory management rights to require that employees participate in a survey. Since the record was devoid of any evidence that the Department of Corrections undertook any action which was intended to, or did in fact, interfere with or diminish petitioner's rights under the NYCCBL, we dismissed the improper practice petition.

We find that contrary to the UPOA's contention, Decision No. B-2-86 did not turn on whether or not the City attempted to circumvent union input; but rather, on our finding that the Union failed to present any evidence to show that the City's exercise of its statutory management rights violated petitioner's rights pursuant to Section 12-306a of the NYCCBL.

Additionally, we find that the City has drawn a valid distinction between meeting with its employees to discuss changes

in their working conditions and meeting with its employees to gather their opinions or to obtain information. Section 12-307a of the NYCCBL provides that "public employers and certified or designated employee organizations shall have the duty to bargain in good faith....." Consequently, the City does not have the right to bypass the union and negotiate directly with its employees. Meeting with employees to gather their opinions and to obtain information, however, does not constitute negotiations. To the contrary, as noted previously, in Decision No. B-2-86 we determined that such a request or requirement by the City falls within the realm reserved to it by the management rights provision set forth in Section 12-307b of the NYCCBL.[4]

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[4] See also, City of Albany, 17 PERB ¶3068 (1984). In that case, PERB held that the Employer's oral or written communication to employees, whether to inform or to persuade, is privileged, provided it does not threaten reprisal, promise benefit or attempt direct negotiations with persons other than bargaining agent.

In County of Onondaga, 14 PERB ¶4503, affirmed, 14 PERB ¶3029 (1981), PERB held that an employer does not violate the Act anytime it engages in a discussion with anyone other than the negotiating agent on matters affecting the employment relationship. In determining whether there has been a violation, PERB stated that the following factors must be considered:

> (1) whether the purpose or intent of discussions with individual employees is to reach agreement on matters affecting the employment relationship;
>
> (2) whether the parties to the meeting are in privity to the employer-employee relationship and whether individuals are representatives of a rival union;
>
> (3) what relationship the topic of discussion bears to the employment relationship; and
>
> (4) importance of the subject matter to the union-employer relationship.

We reject the UPOA's assertion that in any event, the Department was required to negotiate with the Union because changes in working conditions were a focus of the April 18,1988 meeting. The Union claims that the memorandum announcing the meeting supports its assertion. We note, however, that the UPOA has not provided this Board with a copy of the memorandum, nor has it referred to the language of the memorandum. Thus, in the absence of specific facts to support the UPOA's claim, we find that the Department acted within its management right in meeting with its employees on April 18, 1988.

Finally, we reject the Union's claim that the City's conduct interfered with its effectiveness as a bargaining representative and, therefore, violated Section 12-306a of the NYCCBL. In reaching this conclusion, we note that in the PERB decision cited and relied upon by the UPOA in support of its claim, City of Elmira, the parties stipulated that the employer improperly interfered with the unit employee's right of representation in violation of Section 209a.1(a) of the Taylor Law.[5] As a result, we find that contrary to the Union's assertion, City of Elmira is not dispositive of the instant

[5]The Union also cited Decision No. B-25-85 in support of its position. In that case, we determined that where there has been a refusal to confer with the certified employee representative regarding a change affecting terms and conditions of employment, the employer interferes with the effectiveness of the employee representative and, consequently, the rights of the employees it represents, in violation of Section 12-306a of the NYCCBL. Since the UPOA presented no evidence to show that subsequent to the April 18, 1988 meeting the Department implemented changes affecting terms and conditions of employment, we find Decision No. B-25-85 inapplicable to the instant matter before the Board.

matter.

Accordingly, for the reasons set forth above, we find that the Union has failed to allege any action by the Department which constitutes an improper practice pursuant to Section 12-306a of the NYCCBL. Therefore, we shall dismiss the instant improper practice petition.

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

ORDERED, that the improper practice petition filed by the United Probation Officers Association be, and the same hereby is, dismissed.

DATED: New York, N.Y.
May 23, 1989

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Jerome E. Joseph
MEMBER

Edward F. Gray
MEMBER

Edward Silver
MEMBER

Dean L. Silverberg
MEMBER