L.621, SSEU, Autorino (Pres. of SSEU) v. City, NYFD, 47 OCB 30 (BCB 1991) [Decision No. B-30-91 (IP)]

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

VINCENT AUTORINO, PRESIDENT, LOCAL 621, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Petitioner,

-and-

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

Respondents.

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DECISION NO. B-30-91

DOCKET NO. BCB-1328-90

DECISION AND ORDER

On October 11, 1990, Vincent Autorino, President, Local 621, Service Employees International Union, AFL-CIO ("Local 621" or "the Union"), filed a verified improper practice petition against the City of New York ("City") and the Fire Department of the City of New York ("Department"). The Union alleges that respondents have violated Section 12-306a of the New York City Collective Bargaining Law ("NYCCBL") by "embark[ing] upon a process of replacing employees represented by Local 621 with non-Union employees."

The City filed an answer to the improper practice petition on October 29, 1990. Local 621 filed a reply on November 8, 1990.

Background

The City states that "[i]n 1989, the Repairs and Transporta-tion Division of the [Department] was restructured into two new units. Several new positions were created in one of the two new units, the Fleet Maintenance Division. One such position is entitled Deputy Director [of Motor Equipment Maintenance (Fire Department)]."[1] The "General Statement of Duties and Responsi-bilities" for this title provides:

> This is a management class of positions. All personnel perform related work.
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> Under general direction, with great latitude for the exercise of independent judgement, is responsible for managing the activities of a segment of the Fire Department's motor vehicle repair and maintenance operation, involving a Central Repair Shop and a large support facility; performs related work.
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> Directs the operations of a segment of a very large Central Repair Shop comprised of a number of motor vehicle repair and maintenance functions, or may direct motor vehicle repair and maintenance field operations involving a large support facility. May be assigned administrative responsibility for support operations for motor vehicle maintenance and repair. May be assigned to coordinate complex operational programs with other major organizational units within the Department.
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> Has personnel and budget responsibilities for supervised area including overtime budget, personnel recruitment, interviewing, hiring, vacancy control, and personnel allocation.
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> Requests, justifies and allocates OTPS Budget within area of responsibility; makes budget recommendations to the Director, administers, monitors and controls OTPS fund expenditures.
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> Develops and recommends capital improvement projects to the Director to upgrade or expand present facilities, or provide new

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[1] On December 21, 1988, the City's Department of Personnel issued a Temporary Title Code Routing Slip (#494), which created the title Deputy Director of Motor Equipment Maintenance (Fire Department), assigned a temporary title code number (Title Code No. M06477), and indicated the number of positions required as four (4).

> ones, monitors purchases and funding for the acquisition of capital equipment.
>
> Develops and maintains Productivity Monitoring Programs for subordinate supervisors and monitors progress toward on-going targets.
>
> Directs the operations of Special projects, including but not limited to new equipment, warranties, research and development, and engineering. May direct the operations of materials management and production control. May serve as Director of Motor Equipment Maintenance in the Director's absence.

The City maintains that "on or about January 1989, a vacancy notice was posted announcing four vacancies for the position of Deputy Director."

On May 5, 1989, the Department filled the first Deputy Director position by hiring Mr. Per Hansen.

There is no dispute that following the appointment of Mr. Hansen, the parties discussed the Department's decision to create the Deputy Director positions at several Labor-Management meetings.[2]

On June 18, 1990 and July 16, 1990, the Department filled the second and third Deputy Director positions, by hiring Mr. Eugene Luongo and Mr. Arthur Beazley, respectively.[3]

On October 11, 1990, the Union filed the instant petition, claiming that all three Deputy Directors perform the same work as was traditionally performed by employees in the title Supervisor of Mechanics (Mechanical

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[2] Labor-Management meetings were held on May 22, 1989, August 11, 1989, and February 8, 1990.

[3] The fourth position remained vacant at the time the instant petition was filed.

Equipment).[4] Local 621 alleges that by replacing bargaining unit positions with non-Union positions, the Respondents have violated Section 12-306a of the NYCCBL because their actions constitute: (1) unlawful discrimination on the basis of Union membership; (2) an attempt to avoid compliance with the

[4] Since 1970, Local 621 has been the exclusive representative for the purposes of collective bargaining for the title of Supervisor of Mechanics (Mechanical Equipment), Title Code No. 92575. According to the job specification for the title, the "General Statement of Duties and Responsibilities" provides:

> Under general supervision or direction, supervises, directs and is responsible for the work of assigned personnel in connection with the repair, overhaul and maintenance of various types of mechanical equipment, motor vehicles and automotive equipment. Supervises assigned personnel.
>
> May be assigned to serve as Senior Supervisor and placed in responsible charge of one large or several smaller repair facilities, machine shops, plants or pumping stations, a borough shop and its satellite garages or several shops in a central repair shop. May be required to coordinate personnel and activities within assigned area. Supervises assigned personnel.
>
> May be assigned to serve as Assistant Supervising Supervisor and placed in responsible charge of several shops or pumping stations, several borough shops and their satellite garages or an entire floor comprised of shops and related facilities in a central repair shop. May assist in the planning, directing and coordinating of repair and maintenance activities. Supervises assigned personnel.
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> May be assigned to serve as Supervising Supervisor and placed in responsible charge of various operations and functions of a unit comprised of garage operations, borough shops, central repair shop, plants or pumping stations, or similar repair and maintenance function. This assignment involves planning, directing and coordinating repair and maintenance activities. Performs administrative work. May serve as principal assistant to a bureau director. Supervises assigned personnel. [Emphasis added.]

parties' collective bargaining agreement[5] and the applicable Comptroller's Determination;[6] and (3) an effort to avoid bargaining with Local 621 on matters that are within the scope of mandatory collective bargaining.

Positions of the Parties

Local 621's Position

At the outset, the Union submits that it is not challenging the Department's right to create the position of Deputy Director of Motor Equipment Maintenance (Fire Department). Rather, Local 621 questions the Department's motive for creation of the title which, the Union claims, did not become evident until after the Department began to fill the Deputy Director positions.

Local 621 claims that because Messrs. Hansen, Luongo and Beazley are "performing the same supervisory work which had always been performed by Supervisors represented by Local 621," it is clear that the Department intends to decimate the bargaining unit and, thereby, avoid its obligation to bargain with Local 621.

As evidence of the Department's unlawful intent, the Union claims that the appointment of Luongo and Beazley, on June 18, 1990 and July 16, 1990 respectively, has directly resulted in the elimination of two Local 621

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[5] The current collective bargaining agreement between the City and Local 621 covers a four year period from July 1, 1986 to June 30, 1990.

[6] The applicable Comptroller's Determination, executed on December 12, 1988, provides for wages and other supplemental benefits according to Section 220 of the Labor Law of the State of New York.

positions previously filled by employees in the title Supervisor of Mechanics (Mechanical Equipment). Specifically, the Union alleges that Luongo and Beazley are performing the same supervisory duties that were previously performed by Local 621 members assigned to serve as Assistant Supervising Supervisor of Mechanics and Supervising Supervisor of Mechanics. The Union maintains that these two levels within the Supervisor of Mechanics title had always been designated as the Assistant Chief and Chief of the Department, respectively.

As further proof of the employer's improper motive, the Union submits that the Department has failed to articulate a colorable explanation for its elimination of these Local 621 positions at any of the Labor-Management meetings during which this matter was discussed.

For all these reasons, the Union asserts, it has alleged facts sufficient to raise a substantial issue concerning the Department's true motive for creating the Deputy Director title, warranting a hearing in this matter.

City's Position

As its first affirmative defense, the City contends that Local 621's petition was filed far in excess of the four month time limitation set forth in Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"). In this connection, the City submits that the gravamen of the dispute concerns the creation of a non-Union title, an act which Local 621 alleges was improperly motivated. Accordingly, a petition challenging the creation of that title should have been filed within four

months of the date that Local 621 was on notice of the alleged violation, i.e., when the vacancies were posted in January 1989. Therefore, the City submits, the instant petition, which was filed in October 1990, should be dismissed as untimely.

The City also asserts that the petition fails to state a cause of action because the act complained of falls "squarely within the City's statutory management rights." Citing Section 12-307b of the NYCCBL (Management Rights) and several Board decisions on the subject, the City claims that it has a unilateral right to create new positions or titles to maintain the efficiency of the Department, absent any limitation on this right in the parties' collective bargaining agreement.[7]

Finally, the City maintains that Local 621 fails to allege facts sufficient to establish that creation of the title at issue was motivated by anti-union animus. In this respect, the City cites Decision No. B-47-89, where the Board held:

> Only where it could also be shown that the action was taken by management with intent to do the Union harm would it be found that the element of improper motivation essential to a finding of improper practice had been established. Thus, even if the Union's projections are assumed to be sound, in order to establish improper motivation, the Union must also show that the City knew that its revision of the job specifications would adversely effect PAA's representa-tional rights, and it must also show that the negative impact was a motivating factor behind the City's decision to make the revisions [footnote omitted]. These allegations of improper motive must be based upon statements of probative facts rather than upon recitals of conjecture, speculation and surmise [footnote omitted].

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[7] In support of its argument, the City cites Decision Nos. B-6-90; B-37-87; B-13-74; B-1-74; B-1-70; B-3-69.

Discussion

As a preliminary matter, we must address the City's assertion that Local 621's petition, filed on October 11, 1990, is untimely because it challenges the creation of the title Deputy Director of Motor Equipment Maintenance (Fire Department), a matter the Union had notice of in January 1989. The Union responds that it "did not know or could not have guessed when the Deputy Director position was created ... that the [Department] would use that position to eliminate Supervisors." Local 621 contends that not until the appointment of Luongo and Beazley (on June 18, 1990 and July 16, 1990), which resulted in the elimination of two Local 621 positions, could it present for the first time "a substantive allegation that the [Department] appointed non-Union employees to wipe out Supervisor positions."

Section 7.4 of the OCB Rules provides:

> Improper Practices. A petition alleging that a public employer or its agents ... has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf ....

We have long held that where the events complained of arose more than four months prior to the filing of the petition, and there is no allegation that such events continued or occurred at any time within the four month time limitation prescribed by Section 7.4 of the OCB Rules, the petition will be dismissed as untimely.[8] It is also true that "a union appropriately interposes itself only after an action of management has had an 'immediate impact on the employees represented by the union or necessarily entails such

[8] E.g., Decision Nos. B-60-88; B-18-82.

impact in the immediate or foreseeable future.'"[9] Thus, "a party may also await performance of an action and file an improper practice charge within four months after the intended action is actually implemented and the charging party is injured thereby."[10]

Applying these principles to the instant matter, we find that Local 621's petition, to the extent that it complains of the hiring of Luongo and Beazley, was filed within four months of the perceived impact of their appointments. Although Local 621 may not be heard to complain about conduct which commenced more than four months prior to the date the instant petition was filed (i.e., the creation of the title and the hiring of Hansen), a petition which complains of a course of conduct, the impact which the Union asserts became manifest with the hiring of Luongo and Beazley, is not time-barred with regard to these appointments.[11] Moreover, the Union does not challenge the Department's right to create the title at issue; nor does it specifically allege that Hansen has replaced any bargaining unit positions. Rather, Local 621 complains that the appointment of Luongo and Beazley "has been utilized by the Department as a basis for eliminating any Chiefs or

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[9] See Decision Nos. B-1-90. See also, Decision Nos. B-42-88; B-44-86; B-25-85.

[10] See Barry v. United University Professions, 23 PERB ¶3024, 3047 (1990), citing Werner v. Middle County Teachers Association, 21 PERB ¶3012 (1988).

[11] We note that allegations which are time-barred may be considered in the context of background information rather than as specific violations of the NYCCBL. See Decision Nos. B-28-89; B-25-89; B-7-84; B-27-83; B-2-82; B-10-81.

Assistant Chiefs." Accordingly, we reject the City's contention that Local 621's petition should be dismissed as untimely.

Turning to the merits of the Union's petition, we find that the thrust of the charge is that the Department has converted at least two positions previously held by employees in titles represented by Local 621 to positions held by employees in titles which are alleged by the City to be within the managerial class of positions.[12] The Union contends that the Department intends to decimate the bargaining unit and, thus, avoid its obligation to bargain with Local 621 with respect to the wages, hours and working conditions of employees filling these positions.

The City submits that the acts the Union complains of constitute a legitimate exercise of management's statutory right to "maintain the efficiency of governmental operations" and to "determine the methods, means and personnel by which government operations are to be conducted."[13] In the absence of any proof that anti-union animus was a motivating factor in the Department's decision, the City asserts, Local 621 fails to state a claim upon which relief can be granted.

Section 12-305 of the NYCCBL provides, inter alia:

> 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 form any or all of such activities....

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[12] Pursuant to Section 12-305 of the NYCCBL, "neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively."

[13] See Section 12-307b of the NYCCBL.

The enjoyment of these rights is protected and implemented by another section of the statute which identifies acts that are prohibited to a public employer because they would impair or diminish the rights prescribed by Section 12-305. Thus, Section 12-306a provides that 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;
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> (2) to dominate or interfere with the formation or administration of any public employee organization;
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> (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;
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> (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.

In the context of the instant case, if the record supported a conclusion that the employer was motivated by a desire to frustrate the statutory rights of its public employees or of any public employee organizations by taking steps to reduce the number of positions within a title that is certified to a particular bargaining unit, we would find that the employer's actions constitute an improper practice within the meaning of the NYCCBL. However, in the absence of proof of unlawful motive, direct or circumstantial, decimation of a unit to whatever extent, by the abolition of positions within a title which may occur as a result of reorganization of the employer's operation, is not an improper practice.[14] The fact that an otherwise proper and legal action of a public employer may incidentally have a detrimental effect upon a

[14] Decision No. B-43-80.

union does not necessarily mean that the action constitutes an improper practice.[15]

> In an analogous case, Decision No. B-43-80, we considered whether:
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> ... the increase of the number of exempt positions and the concomitant reduction proportionately in the number of competitive titles [in the Corporation Counsel's office], even absent any improper motivation, is an improper practice because it results in a reduction in the number of positions within the bargaining unit and thus reduced the effectiveness of the bargaining representative.

In that case, we held that some employer decisions, such as the determination of the personnel by which government operations are to be conducted, "are so peculiarly matters of management prerogative that they would never constitute violations of Section 12-306a unless discriminatorily motivated." Accordingly, inasmuch as the gravamen of the instant dispute similarly concerns a matter of management prerogative, in order for Local 621 to prevail it must establish that the Department acted with improper motivation.

The Union alleges that an inference of improper motive can be drawn from the fact that the Department eliminated two Local 621 bargaining unit positions by filling them with employees who perform the same duties and responsibilities as the Union employees they replaced - but are in titles claimed to be within a management class of positions.[16] In further support of

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[15] Decision No. B-47-89.

[16] It should be noted that, although the City may maintain that a particular title is managerial, only the Board of Certification has the power to determine whether employees serving in that title are managerial within the meaning of the NYCCBL and, thus, excluded from bargaining. Thus, if Local 621 were to petition to represent employees in the title of Deputy Director of Motor Equipment Maintenance (Fire Department), the

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the inference, the Union alleges that the Department "has failed to articulate a colorable explanation" for its decision to hire the Deputy Directors at issue and, thus, has not demonstrated a legitimate business reason for its action.

We are not persuaded, on the basis of these facts, that a substantial issue concerning the Department's alleged improper intent has been raised by the Union so as to warrant hearings in this matter. Local 621 has presented no direct evidence of anti-union animus; neither is that element established by the circum-stances of this case.

It is well settled that allegations of improper motivation must be based upon statements of probative facts rather than upon recitals of conjecture, speculation and surmise.[17] The Union has not submitted any evidence, other than a bare assertion, to support the allegation that the work performed by the Deputy Directors at issue is work within the duties and responsibilities of Local 621 Supervisors.[18] Although the Union alleges that two positions

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[16](...continued)
burden would be on the City to prove, to the satisfaction of the Board of Certification, that the title was managerial within the meaning of the law.

[17] Decision Nos. B-48-89; B-8-89; B-7-89; B-2-86; B-3-84; B-43-82.

[18] It should be noted that the collective bargaining agreement between these parties, at Article V, Section 1(c) defines a grievance as: "A claimed assignment of employees to duties substantially different from those in their job specifications [emphasis in original]." We have previously held that where the term "grievance" is so defined, a complaint which alleges that others are performing work of the grievants is arbitrable. See e.g., Decision No. B-12-77. In any event, it is well-settled that our jurisdiction under Section 12-306a of the
(continued...)

previously filled by Local 621 Supervisors are now filled by Deputy Directors, the Union has submitted no evidence that Local 621 Supervisors designated as the Assistant Chief or Chief, or any other Local 621 Supervisors have been laid off or otherwise subjected to any hardship as a direct result of the Department's decision.[19] Furthermore, the petition is devoid of any indicia of bad faith, e.g., that implementation of the Department's plan to reorganize the Repairs and Transportation Division followed some effort by Local 621 to

[18](...continued)
NYCCBL may not be invoked when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement. See Decision Nos. B-39-88; B-37-87; B-36-87; B-29-87; B-24-87; B-17-86.

[19] In Decision No. B-14-80, we held that the PBA failed to demonstrate how the replacement of police personnel by civilians in the Management Information Systems Division would constitute an improper practice absent a showing that the City was motivated by anti-union animus or facts which would indicate that any employee had been discriminated against. In that case, we held: "There is no allegation that any employee represented by the PBA has been or will be laid off, fired, or otherwise subjected to any hardship as a consequence of the alleged replacement of personnel in the unit in question."

organize new members,[20] let alone overt expressions of hostility toward the Union.

The Department's mere failure to articulate a reason for its actions that is satisfactory to the Union, without more, does not constitute evidence sufficient to satisfy the Local 621's burden of proving improper motivation.[21] Moreover, because the Union has presented insufficient evidence to state a claim of improper practice, the Department is under no affirmative obligation to demonstrate, at this juncture, that the actions it took were legitimately motivated. Mere suspicion does not suffice to shift the burden of proof.[22]

Finally, we do not find merit in Local 621's supposition that because the Department will not have to bargain collectively with Local 621 with respect to the wages, hours and working conditions of the Deputy Directors at

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[20] For example, in Board of Education of the City of New York v. Organization of Staff Analysts, 18 PERB ¶3068 (1985), PERB found that the employer's effort to reevaluate and reclassify persons who were serving the staff analyst series would not have been undertaken if OSA had not opposed the employer's application to declare some of the employees in those titles managerial and/or confidential ("M/C") and a representation petition were not pending. PERB held: "Indeed, [the record] shows that having sought to create the staff analyst series for M/C positions only, the [employer] undertook the reevaluations - after the commencement of the representation case - for the purpose of altering the outcome of that case." (It should be noted that for the purpose of deciding whether the ALJ erred in dismissing the charge, OSA's allegations of fact were deemed true.)

[21] Decision No. B-1-91.

[22] E.g., in Decision No. B-67-90, we held that initially, the petitioner must sufficiently show that anti-union animus was a "substantial" or "motivating" factor in the employer's decision. If the respondent does not refute the petitioner's showing, then it must establish that its actions were motivated by another reason not violative of the NYCCBL.

issue, that the employer has committed an improper practice based upon a refusal to bargain in good faith. In citing Decision No. B-47-89,[23] the City correctly points out that even if the Union's projections are assumed to be sound, i.e., the City need not "bargain with Local 621 on matters within the scope of mandatory collective bargaining by hiring non-Union personnel allegedly not covered by Local 621 contracts or Comptroller's Determinations," the Union nevertheless must establish that this was the intended result. Based on the facts before us, we cannot conclude that Local 621 has even arguably demonstrated that avoidance of the obligation to bargain with the Union was a motivating factor in the City's decision to create the Deputy Director title.

In conclusion, in the absence of any probative showing by Local 621 that an aspect of the Department's decision to reorganize its Repair and Transportation Division, i.e., which called for the creation of four positions alleged to be managerial, was undertaken for an unlawful purpose, we find that the petition does not warrant a hearing to inquire further into the Department's motivations.[24] Therefore, we shall dismiss the instant improper practice petition in its entirety. However, nothing in this decision shall constitute prejudice to any rights the Union may have in another forum subject, of course, to the City's right to raise any applicable affirmative defenses.

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[23] Supra, at 8.

[24] Decision Nos. B-68-90; B-14-80.

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 improper practice petition filed by Vincent Autorino, President, Local 621, Service Employees International Union, AFL-CIO be, and the same hereby is, dismissed.

DATED: New York, New York
May 23, 1991

MALCOLM D. MacDONALD
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