L.621, SSEU, Autorino (Pres. of SSEU) v. City, NYFD, 47 OCB 37 (BCB 1991) [Decision No. B-37-91 (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-37-91

DOCKET NO. BCB-1328-90

INTERIM DECISION AND ORDER

On May 23, 1991, the Board of Collective Bargaining ("the Board") issued Decision No. B-30-91 in the case docketed as BCB 1328-90, dismissing an improper practice petition filed by Local 621, Service Employees International Union, AFL-CIO ("L. 621" or "the Union") against the City of New York ("the City") and the Fire Department of the City of New York ("the Department"). Therein, the Union alleged that the Department violated Section 12-306a of the New York City Collective Bargaining Law ("NYCCBL") by "replacing employees represented by L. 621 with non-union employees."

By letter dated June 11, 1991, counsel for Local 621, requested that the Board reconsider its decision. By letter dated June 18, 1991, counsel for City, on behalf of the Department, opposed the request. By another letter dated June

18, 1991, counsel for L. 621 submitted additional information in support of the Union's request for reconsideration.

Decision No. B-30-91

In 1989, the Department created the title Deputy Director of Equipment Maintenance (Fire Department) ("Deputy Director") which, it alleged, was in the management class of positions. The City explained that this title was one of several new positions created as part of the Department's overall plan to restructure its fleet maintenance operations, including the Repair and Transportation Unit ("R&T Unit"). In January 1989, the Department posted a notice announcing four vacant positions in the title at issue. Three of the four Deputy Director positions were filled between May 1989 and June 1990.

L. 621 is the certified representative for the title Supervisor of Mechanics ("Supervisor"), which has four assignment levels of increasing responsibility: Supervisor; Senior Supervisor; Assistant Supervising Supervisor; and Supervising Supervisor. The Union claimed that until 1990, two Supervisors had been assigned to duties commensurate with the latter two levels of responsibility and, as such, were designated as the Assistant Chief and Chief of the Department's R&T Unit, respectively.

In an improper practice petition filed on October 29, 1990, the Union alleged that the Department eliminated at least two

bargaining unit positions by hiring Deputy Directors to perform the same duties previously performed by Supervisors designated as the Assistant Chief and Chief of the R&T Unit. In support of the assertion that the Department's actions were improperly motivated, the Union alleged that unlawful intent can be inferred from the Department's failure "to articulate any colorable explanation for its elimination of Supervisor positions." Based on these facts, the Union requested that a hearing be held to investigate whether the Deputy Directors "were appointed for a legitimate, non-discriminatory reason, or ... for the purpose of eliminating positions represented by L. 621 as a result of anti union animus."

In Decision No. B-30-91, the Board found that L. 621 had failed to establish an arguable claim of improper motivation. Specifically, the Board found that the Union failed to offer any evidence, either direct or circumstantial, sufficient to raise a substantial issue concerning the Department's alleged improper intent. Particularly because the act complained of concerned an exercise of managerial prerogative, the Board held, "in the absence of any probative showing by Local 621 that an aspect of the Department's decision to reorganize its (R&T Unit) ... was undertaken for an unlawful purpose, ... the petition does not warrant a hearing to inquire further into the Department's motivations."

DISCUSSION

Although Section 12-308 of the NYCCBL provides that an aggrieved party must seek review of an order of this Board under Article 78 of the CPLR, it is within our discretion to grant or deny L. 621's request for reconsideration of Decision No. B-30-91.[1] In that decision, we held that an employer is entitled, absent improper motivation, to create non-unit positions.[2] Here, the Department created a title which it maintained was within the managerial class of positions. There being no evidence before us, at that time, that the Department's actions were intended to frustrate the statutory rights of its public employees or any public employee organization, we found that the Union failed to state a cause of action under the NYCCBL.

We must now consider whether L. 621's request for reconsideration provides a sufficient basis to warrant reopening of the case because evidence supporting an arguable claim of improper motivation was not available to petitioner before the close of the record in this matter. This Board generally will not reopen and reconsider a case based on the mere failure of a party to present relevant evidence and argument which was

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[1] See Decision Nos. B-10-78; B-23A-75.

[2] See Decision No. B-30-91 and the cases cited therein. See also, Decision Nos. B-40-82; B-14-80; B-4-79.

available to it upon the initial litigation of the matter.[3] We adhere to a standard set forth in the CPLR Rule 5015, which provides:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
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> > 2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial ... [emphasis added).

Applying this standard to the instant matter, we find that the Union's allegations which, heretofore, were supported only by statements of conclusion, speculation and surmise, are now supported by allegations which, if proven, would be of sufficient magnitude to support an inference of improper motive.[4] Had this information been introduced into the record and not refuted or

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[3] See Decision No. B-10-78. See also, Adjunct Faculty Association, 18 PERB ¶3076 (1985); Social Service Employees Union. Local 371, 11 PERB ¶3004 (1978).

[4] In this connection, we note that the information provided by the Union on June 11, 1991, which the Union should have attempted to submit to this Board for its consideration before we issued our decision on May 23, 1991, is of questionable probative value inasmuch as it shows only that the Department, on the basis of an independent study and report, has taken action intended to take affected employees out of competitive civil service status and to make them non-competitive. Just as the creation of an alleged managerial title fails to constitute an improper practice absent improper intent, similarly, lawfully motivated efforts to have a title removed from competitive civil service status also constitutes no violation of the NYCCBL.

However, we reach a different result with respect to the Union's offer of proof submitted on June 18, 1991, particularly with reference to the statement of Chief Feehan, dated that same day.

explained prior to issuance of Decision No. B-30-91 herein, it probably would have produced a different result. In other words, the critical issue before us is no longer whether the mere creation of a non-unit title, having the alleged effect of eliminating Union positions, constitutes a violation of the NYCCBL. Rather, the issue raised by this additional information is whether the alleged elimination of the higher-level L. 621 Supervisor positions was motivated by anti-union animus and/or the intention of management to avoid its obligations under the collective bargaining agreement.

Therefore, we find that the circumstances warrant the reopening of the case docketed as BCB-1328-90 to allow the introduction of this newly discovered evidence into the record. We shall also direct that the City respond to this new material within ten (10) days of its receipt of this interim decision and order. Such response shall contain admissions, denials or any applicable affirmative defenses consistent with these new facts and allegations. After consideration of the positions of both parties concerning this new material, we will then determine whether further proceedings are warranted.

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 record in the improper practice case docketed as BCB-1328-90, filed by Vincent Autorino, President, Local 621, Service Employees International Union, AFL-CIO be, and hereby is, reopened; and it is further

ORDERED, that the City of New York and the Fire Department of the City of New York serve and file a response consistent with our direction herein, within ten (10) days of its receipt of this Interim Decision and Order.

DATED: New York, New York
July 30, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE B. DANIELS
MEMBER

JEROME E. JOSEPH
MEMBER