Lara v. City, 47 OCB 47 (BCB 1991) [Decision No. B-47-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding -between- PABLO LARA, Petitioner, -and- CITY OF NEW YORK Respondent.	DECISION NO. B-47-91 DOCKET NO. BCB-1401-91

DECISION AND ORDER

On July 22, 1991, Pablo Lara ("Petitioner") filed a verified improper practice petition against the City of New York ("the City"), in which he alleged that respondent violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1] Section 12-306a of the NYCCBL provides 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 § 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 employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(continued...)

On August 5, 1991, the City, by its Office of Labor Relations, filed an answer to the petition and on August 19, 1991, Petitioner replied.[2]

Pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"),[3] the Executive

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[1](...continued)
(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.

[2] The City was not required to file an answer by that date since the petition was still under review by the Executive Secretary pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining. Therefore, the answer was not considered in reaching Decision No. B-39-91(ES). Likewise, Petitioner's reply was also disregarded.

[3] Section 7.4 of the OCB Rules provides as follows:

Improper Practices. A petition alleging that a public employer or its agents or a public employee organization 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 or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order. Within ten (10) days after a petition alleging improper practice is filed, the Executive Secretary shall review the allegations thereof to determine whether the facts as alleged may constitute an improper practice as set forth in [Section 12-306] of the statute. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the Executive Secretary and copies of such determination shall be served upon the parties by certified
(continued...)

Secretary of the Board of Collective Bargaining reviewed the petition and determined that it did not allege facts sufficient as a matter of law to constitute an improper practice within the meaning of the NYCCBL. Accordingly, in a determination dated August 13, 1991, the petition was dismissed.[4]

On September 16, 1991, pursuant to Section 7.4 of the OCB Rules, the petitioner filed a written appeal to the Executive Secretary's determination.

BACKGROUND

Facts Alleged in the Original Petition

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[3](...continued)
mail. If, upon such review, the Executive Secretary shall determine that the petition is not, on its face, untimely or insufficient, notice of the determination shall be served on the parties by certified mail, provided, however, that such determination shall not constitute a bar to assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent. Within ten (10) days after receipt of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board of Collective Bargaining an original and three (3) copies of a statement in writing setting forth an appeal from the decision together with proof of service thereof upon all parties. The statement shall set forth the reasons for the appeal.

[4] The decision was sent to Petitioner by certified mail on August 13, 1991. However, this office never received the return receipt. On August 30, 1991, a second copy of the decision was sent to Petitioner by both certified mail and regular mail. The return receipt from this second mailing indicated that Petitioner took delivery of the decision on September 4, 1991.

Petitioner alleged, in his original petition, that the City violated §12-306a(1) and (2) by permitting employees in supervisory job titles to hold positions as officers in the Social Service Employees Union, Local 371. As a remedy, Petitioner requested an order directing the City "to require those identifiable employees [in] supervisory positions to relinquish their union officership positions in the Social Service Employees Union, Local 371."

The Executive Secretary's Determination

In Decision No. B-39-91(ES), the Executive Secretary found that the petition failed to allege that the City had committed any acts in violation of Section 12-306 of the NYCCBL. The Executive Secretary explained:

> The NYCCBL does not provide a remedy for every perceived wrong or inequity. Its provisions and procedures are designed to safeguard the rights of publi

c employees set forth therein, i.e., the right to bargain collectively through certified public employee organizations; the right to organize, form, join, and assist public employee organizations; and the right to refrain

from such activities ...Since the instant petition does not allege that respondent's actions were intended to, or did, affect any rights protected under the NYCCBL, it must be dismissed.

The Executive Secretary further noted that §12-309b(1) provides that the Board of Certification shall have the power and the duty to make final determinations of the units appropriate for collective bargaining between public employers and public

employee organizations.[5] Supervisory employees, the Executive Secretary found, may belong to the same unit as non-supervisory employees in accordance with the terms of NYCCBL §12-309b(1). The Executive Secretary held that where supervisory and non-supervisory employees are found in the same bargaining unit, nothing in §12-309b prohibits supervisory employees from holding offices in that unit.

The Appeal

[5] Section 12-309b(1) of the NYCCBL provides, in pertinent part, as follows:

> The board of certification, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
> (1) to make final determinations of the units appropriate for purposes of collective bargaining between public employers and public employee organizations, which units shall be such as shall assure to public employees the fullest freedom of exercising the rights granted hereunder and under executive orders, consistent with the efficient operation of the public service, and sound labor relations, provided that in any case involving a petition for certification where supervisory or professional employees petition to be represented for purposes of collective bargaining separate and apart from non-supervisory or non-professional employees, or where a petition for certification has been filed requesting a unit of supervisory and non-supervisory or a unit of professional and non-professional employees and the public employer objects thereto, the board of certification shall not include such supervisory or professional employees in a bargaining unit which includes non-supervisory or non-professional employees respectively unless a majority of the supervisory or professional employees voting in an election vote in favor thereof (emphasis added).

The Petitioner acknowledges that Section 12-309(b)(1) permits supervisory and non-supervisory employees to belong to the same bargaining unit. He also acknowledges that nothing in the statute prohibits supervisory employees from holding union office. However, Petitioner argues, that is not what is at issue in the instant case.

Petitioner alleges that two of the supervisors who hold office in the Union are "heavily involved in the collective bargaining process" and that their duties include determining the Union's negotiating objectives, naming the Union's collective bargaining representatives, and determining how the union will enforce the contract into which it ultimately enters. Petitioner argues that "[b]ecause of their dual roles as supervisors and union officers, they cannot function as the single-minded advocates for their members that the adversarial framework of the collective bargaining process demands." Therefore, the Petitioner contends, the issue is whether allowing supervisory employees to hold office impermissibly involves management in union affairs and interferes with public employees in the exercise of their rights, as prohibited by §12-306(a)(1) and (2) of the NYCCBL.

DISCUSSION

The purpose of an appeal of the Executive Secretary's determination is to review the correctness of the determination

based upon the facts that were available to her in the record as it existed at the time of her ruling. New facts may not be alleged at a later date to attack the basis for her determination.[6]

Based upon the record that was before the Executive Secretary in this case, we agree entirely with her finding that no facts were alleged which tended to demonstrate the basis for any improper practice as defined in Section 12-306 of the NYCCBL. Accepting the truth and accuracy of the allegations set forth in Petitioner's improper practice petition, nothing more was shown than that employees in supervisory titles hold positions as officers in the Union.

Section 12-309b(1) of the NYCCBL expressly permits creation of bargaining units including both supervisory and non-supervisory employees. It sets no limits on the rights of supervisory employees in such units to act as officers thereof nor would any such limitation in the law be valid since it would constitute impermissible discrimination against such supervisory employees. This being so, their performance of the collective bargaining and contract administration functions in which union officers are commonly involved cannot be intrinsically wrongful or illegal. Moreover, the Petitioner's contentions that the City is somehow guilty of improper labor practices in this connection is misguided. The City did not create the bargaining unit in

[6] Decision Nos. B-54-90; B-55-87; B-26-86.

question here. Like all bargaining units created pursuant to the provisions of the NYCCBL, the bargaining unit of which Petitioner is a member and the operation of which is the subject of his complaint was certified by the Board of Certification.

If Petitioner believes that this bargaining unit does not and cannot serve the interests of the employees it is certified to represent and if these views are shared by a substantial number of non-supervisory employees in the unit, the law affords them a means of redressing the situation by seeking a change in the composition of their collective bargaining unit.

For these reasons, we dismiss Petitioner's appeal and confirm the determination of the Executive Secretary in Decision No. B-39-91(ES).

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, is hereby

ORDERED, that the appeal filed by Pablo Lara be, and the same hereby is, denied; and it is further

ORDERED, that the determination of the Executive Secretary in Decision No. B-39-91(ES) be, and the same hereby is, confirmed.

Dated: New York, New York
October 23, 1991

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Dean L. Silverberg
MEMBER

Elsie A. Crum
MEMBER